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A TREATISE ON THE LAW OF *BILLS OF EXCHANGE* AND PROMISSORY NOTES.

BY

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M. DCC. XC.

TO THE PUBLIC.

TWO Treatiſes are already before the public on the ſubject of the following ſheets: Without attempting to appretiate the reſpective merits of theſe performances, or to compare them particularly with his own, the author of the preſent publication feels it neceſſary to obſerve, that the plan of his work differs very materially from either of the others. He has endeavoured to produce a compoſition, which, without diſguſting the profeſſional reader, may be eaſily comprehended by men of buſineſs, and ſerve as an elementary treatiſe to the ſtudent. In executing this plan, he has given, under each diviſion, an hiſtorical deduction of the opinions which have been held on the point immediately under diſcuſſion, and concluded with the law as ſettled by the lateſt deciſions, where, in fact, it has been ſettled. Where the point remains ſtill in doubt, he has ſtated the arguments on both ſides of the queſtion. How far he has ſucceeded in the execution, the public only can decide.

No. 4, Hare Court, Temple,
Oct. 1790.

A TREATISE ON THE LAW OF BILLS OF EXCHANGE AND PROMISSORY NOTES.

CHAPTER I.

Of the Origin and Nature of BILLS OF EXCHANGE *and* PROMISSORY NOTES.

IN the infancy of mankind, nature pointed out the ſimple mode of exchanging one commodity for another, by a comparative eſtimation of their reſpective values, dictated by the immediate wants of the parties to the exchange. But when the occupation of a merchant became a diſtinct profeſſion, proſpects of a more diſtant gain introduced a more exact appretiation of the value of the ſeveral articles; and a common ſtandard, under the denomination of money, to which every thing elſe ſhould be referred as its meaſure, appears to have been adopted at a very early period in the hiſtory of mankind.— Geneſis. It is probable, from the low ſtate of navigation and commerce in the ancient world, that the only improvement, till long after the ſubverſion of the Roman empire, was the reduction of the rude pieces of antiquity to a more commodious form, under the ſanction of the ſtate. It was reſerved for an oppreſſed people, conſidered as the outcaſts of mankind, in an unenlightened age, urged by the neceſſity of their ſituation, to introduce into Europe at leaſt, if not to give birth to a method,

by which the merchants, of regions the moſt remote from each other, could convey the means of procuring the value of their commodities, without the inconveniency of tranſporting gold and ſilver.—About the middle, or towards the end of the thirteenth century, the Jews, driven by the exactions of the Princes from England and France, took refuge in Lombardy, and from thence gave to merchant ſtrangers and travellers, ſecret letters on thoſe to whom they had entruſted their effects in the former countries; who honourably diſcharged the truſt repoſed in them, by complying with the orders contained in the letters.—In the courſe of time theſe letters received a fixed form, and had conferred on them the name of Bills of Exchange.

Monteſquieu, l. 21. c. 16.

It is by means of theſe bills of exchange, that money is now uſually remitted from one country to another: The parties to them are generally four, two at the place where the bill is drawn, and two at the place of payment; as where A, a merchant at Amſterdam, owes money to B, a merchant in London, inſtead of ſending the money in ſpecie to B, he applies to C, another merchant at Amſterdam, to whom D, a fourth perſon, reſiding in London, is indebted to an equal amount; A pays to C the money in queſtion, and receives from him a bill directed to D to pay the amount to B, or any one appointed by him, who ſends it to his correſpondent B, with an order that the money be paid to him by D.

But it frequently happens, that only three perſons are concerned, as where A, reſiding at Amſterdam, and wiſhing to remit money to B at London, for goods bought of him, and having C, a debtor alſo at London, addreſſes his bill to the latter, deſiring him to pay the ſum mentioned to B, or to his order, to whom he then ſends it by letter.

Or if I be at Exeter, and intending to go to London, and wanting money, take it up of a friend at Exeter, and draw him bills drawn on myſelf, payable to whomſoever he ſhall appoint in London.

Beawes, 450.

There may alſo be only two parties concerned in the formation of a bill, as where the perſon making it draws on another to pay to himſelf or to his order.

1 Salk. 130. 6 Mod. 29 Per Holt.

A

A *Bill of Exchange* therefore may be defined, to be an open letter of requeſt, addreſſed by one perſon to a ſecond, deſiring him to pay a ſum of money to a third, or to any other to whom that third perſon ſhall order it to be paid: or it may be payble to bearer. Bill of Exchange, what.

THE perſon who makes the bill is called the *drawer*; he, to whom it is addreſſed, the *drawee*; and if he undertake to pay the amount, he is then called the *acceptor*. The perſon to whom it is ordered to be paid, is called the *payee*, and if he appoint another to receive the money, that other is called the *indorſee*, as the payee is with reſpect to him the indorſer; and any one who happens for the time to be in poſſeſſion of the bill, is called the *holder* of it.

THE time at which the payment is limited to be made is various, according to the circumſtances of the parties, and the diſtance of their reſpective reſidences. Sometimes the money is made payable at *ſight*, ſometimes at ſo many days *after* ſight; at other times, at a certain diſtance from the *date*. *Uſance* is the time of one, two, or three months after the date of the bill, according to the cuſtom of the places between which the exchanges run. Double or treble uſance, is double or treble the uſual time, and half uſance is half the time. Uſance.

USANCE between London and any part of France, is 30 days after date.

BETWEEN London and the following places,—Hamburg, Amſterdam, Rotterdam, Middleburg, Antwerp, Brabant, Zealand, and Flanders,—is one calendar month after the date of the bill.

BETWEEN London and Spain and Portugal, two calendar months.

BETWEEN London and Genoa, Leghorn, Milan, Venice, and Rome, three calendar months.

THE uſance of Amſterdam, on Italy, Spain, and Portugal, is two months.

ON France, Flanders, Brabant, and on any place in Holland or Zealand, is one month.

ON Frankfort, Nuremberg, Vienna, and other places in Germany, on Hamburg and Breſlau, 14 days after ſight, uſance 28 days, and half uſance 7.

HALF uſance, when the uſance is one month, ſhall contain 15 days, notwithſtanding the inequality in the length of the months.

WHERE the time, after the expiration of which a bill is made payable, is limited by months, it muſt be computed by calendar, not lunar months: Thus, on a bill dated the firſt of January, and payable at one month after date, the month expires on the firſt of February.

ON this account it is ſaid in ſome books, that where the bill is dated the laſt day of a month, ſome difficulty may arise from the manner in which that laſt day is expreſſed, on account of the inequality in the length of the months: Thus in caſes of bills payable one month after date, if the date be ſimply the laſt day, and the number of the day be not expreſſed, it is ſaid the month expires the laſt day of the ſucceeding month; as if it bear date the *laſt* day of February, the time does not expire till the 31ſt of March; but if the *number* of the day be expreſſed, the month expires on the day corresponding in number to the date: as if the date be the 28th of February, the time expires on the 28th of March.—On the ſame principle it would ſeem, where the date is the 31ſt of March, the time will not expire till the firſt of May, but where it is the *laſt* day of March, it expires the 30th of April.

BUT this difficulty can hardly ever occur in practice, as is apprehended, the inſtances of bills dated the *laſt* day of a month are very rare; and where one month is longer than the ſucceeding one, it is a rule not to go, in the computation, into a third: Thus, on a bill dated the 28th, 29th, 30th, or 31ſt of January, and payable one month after date, the time expires on the 28th of February in common years, and in the three latter caſes in leap-year, on the 29th.

THE general rule of law is, that when computation is to be made from an act done, the day in *which* the act is done muſt be included; becauſe the law, unleſs to prevent miſchief or inconvenience, admitting no fraction of a day, the act

ates to the first moment of the day, and is considered as done hen. But when the computation is to be *from* the day itlf, the natural construction of the words imports that the ay must be excluded: Thus where a lease is made to com- nence *from* the day of the date, the day is excluded, and it egins the next day, but if it be to commence from the *mak-* g, the day is included.—With respect to Bills of Exchange, owever, the case is different: The custom of merchants, hich makes part of the law of the land, being, that where a ll is payable at so many days after sight, or from the date, e day of presentment or of the date is excluded. Thus, here a bill, payable 10 days after sight, is presented on the rst day of a month, the ten days expire on the eleventh; here it is dated the first, and payable 20 days after date, these xpire on the 21st. Where there is no date, and the pay- ent is directed to be made, so many days *after* date, the te is taken to be the day on which it issued.

Clayton's Case, 2 ventr. 308, 310.

Bellasis v. Hester. Ld. Raym. 281. Coleman v. Sayer. Str. 829.

THE vernal equinox, as the year was rectified by Julius æsar, happened to fall, in the year 325, on the 21st of arch: But from causes which it is foreign to the purpose of is treatise to explain, in 1582, the equinox having changed om the 21st to the 11th of March, Pope Gregory XIII. dered ten days to be taken out of the calendar, and the 11th y of March to be reckoned as the 21st. This edict was nerally obeyed by the nations who acknowledged his au- rity, but most of the protestant countries continued the mer method of reckoning their time, and from hence arose e different modes of computation, which now obtain in rope under the denominations of Old and New Style. ce the days of Gregory, the equinox has receded one day, hat there are eleven days of difference between Old and w Style, or, in other words, the first day of any month, ording to the *old* style, is the 12th according to the *new*.

Old & New Style

OLD style now prevails in Muscovy, Denmark, Holstein, nburg, Utrecht, Gueldres, East Friesland, Geneva, and l the Protestant principalities in Germany, and the Can- f Switzerland.

NEW ſtyle, in all the dominions ſubject to the Crown of Great Britain, in Amſterdam, Rotterdam, Leyden, Haerlem, Middleburg, Ghent, Bruſſels, Brabant, and in all the Netherlands except Utrecht and Gueldres; and in France, Spain, Portugal, Italy, Hungary, Poland, and in all the Popiſh principalities of Germany, and Cantons of Switzerland.

WHERE a bill, payable at a certain time from the date, is drawn at a place uſing one ſtyle, and remitted to a place uſing the other, the time is to be computed according to the ſtyle of the place at which it was drawn.—Thus, on a bill payable the firſt of March old ſtyle, and payable here one month after date, the month is to be reckoned from the 12th of March, becauſe that day, according to the new ſtyle, correſponds to the firſt according to the old*.

SOMETIMES the drawer of a bill makes the date both according to the old and new ſtyle, writing the one above and the other below, a ſmall line drawn between them, thus:

$$\frac{18}{29} \cdot \text{March } \frac{28}{8}$$
$$\text{April}$$

WHERE a bill is payable at a time after ſight, there can be no difficulty; the time muſt evidently be computed according to the ſtyle of the place where it is payable.

Days of Grace.

A cuſtom has obtained among merchants, that a perſon to whom a bill is addreſſed, ſhall be allowed a little time for payment, beyond the term mentioned in the bill, called days of grace. But the number of theſe days varies, according to the cuſtom of different places.

GREAT BRITAIN, Ireland, Bergamo, and Vienna, three days.

FRANKFORT, out of the time of the fair, four days.

LEIPSICK, Naumburg, and Augſburg, five days.

* Beawes, in his Lex Mercatoria, page 484, ſect. 251, ſays, that a bill payable on a certain day, is due on the day mentioned, according to the ſtyle of the place *on* which it is drawn, which ſeems contrary to the reaſon and nature of the thing.

VEN

VENICE, Amſterdam, Rotterdam, Middleburg, Antwerp, Cologn, Breſlau, Nuremburg, and Portugal, ſix days.

DANTZICK, Koningſberg, and France, ten days.

HAMBURG and Stockholm, twelve days.

NAPLES eight, Spain 14, Rome 15, and Genoa 30 days.

LEGHORN, Milan, and ſome other places in Italy, no fixed number.

SUNDAYS and holy-days are included in the reſpite days at London, Naples, Amſterdam, Rotterdam, Antwerp, Middleburg, Dantzick, Koningſberg, and France; but not at Venice, Cologn, Breſlau, and Nuremburg. At Hamburg, the day on which the bill falls due makes one of the days of grace, but it is not ſo elſewhere.

IN England, if the laſt of the three days happen to be Sunday, the bill is to be paid on Saturday.

BUT bills payable at ſight, are to be paid without any days of grace.

BILLS of Exchange ſhould be written in a fair hand, on a long piece of paper, about three inches broad. Their ſtyle admits of ſeveral variations, according as one or more bills are granted for the ſame ſum; or according to the *time* of payment, or the *place* of payment, (though the latter be ſeldom mentioned) as at his own houſe, at the houſe of A. B. &c. or according to the ſpecies in which payment is to be made, as in Engliſh money, French money, &c. or according to the different kinds of value received for them; for though bills in Britain bear only *value received* in general, yet bills drawn in other countries uſually particularize whether the value was given in money, goods, or bills, or according to the number of perſons concerned in the bill; for bills may be drawn by and upon, and payable to, not only ſingle perſons, but alſo perſons in company or co-partnerſhip; or according as the perſon on whom it is drawn is to expect further direction or not from the drawer, and ſo run thus, *as per advice from your humble ſervant*; or thus, *as per advice from A. B.* or *without further advice.*

Form of Bills of Exchange, Beawes, 484.

BILLS of Exchange are diſtinguiſhed by the appellations of *foreign* and *inland* bills; the firſt being thoſe which paſs from

one country to another, and the latter ſuch as paſs betwe
parties reſiding in the *ſame* country. The univerſal conſe
of merchants had eſtabliſhed a ſyſtem of cuſtoms relativ
to *foreign* bills, which was adopted as part of the law in ever
commercial ſtate.

THOUGH the object of Bills of Exchange was at firſt to b
the medium of remittance between *different countries*, yet, i
Italy, Germany, and France, where the trading cities, thoug
included within the limits of an extended government, wer
in effect under the diſtinct juriſdiction of ſovereigns indepen
dent of one another, the merchants of different cities of th
ſame country very ſoon adopted them in their mutual tran
actions, and they were in every reſpect conſidered in the ſam
light in the one caſe as in the other. But in this country
which was united under one firm government, where, in th
infancy of commerce, the tranſactions of one trading tow
with another were of but little importance; and where fro
the better regulated police and eaſier communication betwee
the different parts of the kingdom, gold and ſilver could b
conveyed with greater ſafety; it appears that this mode of ne
gociation was introduced at a very late period, for Lor
Chief Juſtice Holt is reported to have ſaid, that he remem
bered *when* actions on inland bills of exchange firſt began,
that inland bills themſelves cannot be ſuppoſed to have be
very frequent before the reign of Charles the Second: A
when they *were* introduced, they were not regarded with t
ſame favour as *foreign* bills, differing in ſome circumſtance
of which notice will be taken in a ſubſequent part of this tre
tiſe. At length, however, the legiſlature, ſenſible of the a
vantage ariſing to trade from this mode of payment, by t
different ſtatutes, ſet them on nearly the ſame footing w
foreign ones, ſo that what was the law and cuſtom of me
chants with reſpect to the one, is now, in moſt reſpects, t
eſtabliſhed law of the country with reſpect to the other.

Mich. 2 Anne. 6 Mod. 29.

9 & 10 W. III. c. 17. 3 & 4 Ann. c. 9.

THERE is, however, one circumſtance in which they d
fer with reſpect to practice: Inland bills are generally ſin
there being only one of the ſame tenor and date, whereas
reign bills are uſually in ſets, conſiſting of three bills of
ſa

ſame tenor and date, a method adopted by way of precaution to guard againſt the riſk of miſcarriage.

THE following precautions are recommended by Beawes, in the drawing of a Bill of Exchange. 1ſt, That it have its date rightly and clearly expreſſed. 2dly, That it have the name of the place where it is made. 3dly, That the ſum be expreſſed ſo diſtinctly both in words and figures, that no exceptions can be taken againſt it. 4thly, That the payment be ordered and commanded. 5thly, That the time of payment be not dubiouſly expreſſed, nor ſooner nor later than has been agreed on. 6thly, The perſon remitting the bill muſt particularly obſerve, that the name of the perſon to whom payment is to be made, be properly ſpelled; or if it be made to his order, that thoſe words be clearly written. 7thly and 8thly, He muſt obſerve whether his own name be there, and the value *of him* be expreſſed. 9thly, He muſt obſerve that the bill be ſubſcribed by the drawer. 10thly, The drawer muſt principally look to the direction of the bill, that it be true, and directed to the right perſon. 11thly, They muſt both obſerve, that the place where the payment is to be made (and the coin or ſpecie in which the bill is to be paid) be fully expreſſed in the ſuperſcription or body of the bill; and if the drawer, draw upon one not living at the place where the bill is intended to be paid, then the remitter muſt obſerve, that as well the place where the perſon lives that is to pay, as the place where payment is to be made, be expreſſed. Lex Mercatoria, 451.

The following are EXAMPLES of the different kinds of BILLS.

No. I.

London, Jan. 18th, 1782.

Exchange for £. 50 Sterl.

AT ſight (* of this my only Bill of Exchange) pay to Mr. John Rogers, or order, Fifty Pounds ſterling, value received of him, and place the ſame to account, as per advice (or without further advice) from

SAMUEL SKINNER.

To Mr. James Jenkins,
Merchant, in Briſtol.

* This is not always inſerted.

No. II. (1.)

London, the 18th of January, 1782.

Exchange for 10,000 *Liv. Tournoiſes.*

At fifteen days after date (or at one, two, &c. uſances) pay this my firſt Bill of Exchange, (ſecond and third of the ſame tenor and date not paid) to Meſſrs. John Rogers and Co. or order, Ten Thouſand Livres Tournoiſes, value received of them, and place the ſame to account, as per advice from

THOMAS BENCRAFT.

To Mr. Henry Kendrick,
Banker, in Paris.

No. II. (2.)

London, Jan. 18th, 1782.

Exchange for 10,000 *Liv. Tournoiſes.*

At fifteen days after date (or at one, two, &c. uſances) pay this my ſecond Bill of Exchange, (the firſt and third of the ſame tenor and date not paid) to Meſſrs. John Rogers and Co. or order, Ten Thouſand Livres Tournoiſes, value received of them, and place the ſame to account, as per advice from

THOMAS BENCRAFT.

To Mr. Henry Kendrick,
Banker, in Paris.

No. II. (3.)

London, Jan. 18th, 1782.

Exchange for 10,000 *Liv. Tournoiſes.*

At fifteen days after date (or at one, two, &c. uſances) pay this my third Bill of Exchange, (the firſt and ſecond of the ſame tenor and date not paid) to Meſſrs. John Rogers and Co. or order, Ten Thouſand Livres Tournoiſes, value received of them, and place the ſame to account, as per advice from

THOMAS BENCRAFT.

To Mr. Henry Kendrick,
Banker, in Paris.

No. III.

London, January 18th, 1782.

Exchange for D. 1000.

At uſance pay this my firſt of Exchange to Mr. Ignatio Teſtori, (or to the *procuration of* Mr. Ignatio Teſtori) One Thouſand Ducats Banco, value received of Mr. Gregory Laman, and place it to account, as per advice from

NICHOLAS REUBENS.

To Mr. James Robottom,
Merchant, in Venice.

No. IV.

London, Jan. 18th, 1782.

Exchange for 1600 *perooo R's.*

At thirty days ſight, (or uſance, &c.) pay this my firſt of Exchange, (ſecond and third as above) to Samuel Fairfax, Eſquire, or order, One Thouſand Six Hundred Mil-Reas, value received of ditto, and place it to account, as per advice from

JEREMIAH TOMLINSON.

To Meſſrs. Brown and Black,
Merchants, at Liſbon.

No. V.

London, Jan. 18th, 1782.

Exchange for £. 273. 15*s. ſterl. at* 35 *Sc.* 7 *G. per £. ſterl.*

At two uſo's and a half, pay this my firſt of Exchange, (ſecond, &c.) to Mr. Joſeph Jacobs, or order, Two Hundred and Seventy-three Pounds Fifteen Shillings ſterl. at thirty-five ſhillings and ſeven groots per pound ſterling, value received of Mr. James Merryman, and place it to account, as per advice from

JOHN JOHNSON.

To Mr. David Hill,
Merchant, at Amſterdam.

No.

No. VI.

No. 4. *London*, 22 *September*, 1789.

For £. 200. *ſterl. at* 35 *Sh. Flemiſh.*

Two months after date of this my firſt of Exchange, (ſecond, &c.) pay to D. E. or order, at his own houſe, Two Hundred Pounds ſterl. at thirty-five ſhillings Flemiſh per pound ſterling, value received of him, and paſs the ſame to account, as per advice from

Yours, &c.

A. B.

To Mr. Peter Par,
Merchant, at Amſterdam.

No. VII.

* *No.* 10. *London, Sept.* 22, 1765. *£.* 200.

PAY to me, A. B. grocer, in London, or order, on the firſt day of November next, the ſum of Two Hundred Pounds in goods of

Your humble ſervant,

A. B.

To G. H. Vintner,
in Weſtminſter.

Accepts G. H.

Origin of Promiſſory Notes.

As commerce advanced in its progreſs, the multiplicity of its concerns required, in many inſtances, a leſs complicated mode of payment than by Bills of Exchange. A trader whoſe ſituation and circumſtances rendered credit from the merchant or manufacturer who ſupplied him with goods, abſolutely neceſſary, might have ſo limited a connection with the commercial world at large, that he could not eaſily furniſh his creditor with a Bill of Exchange on another man; but his own reſponſibility might be ſuch, that his ſimple promiſ

* It is uſual when the drawer draws a bill or draft on a banker, or on a perſon on whom he uſually draws, to number the bill in this manner.

of payment, reduced to writing for the purpoſe of evidence, might be accepted with equal confidence as a bill on another trader: Hence it may reaſonably be conjectured, Promiſſory Notes were at firſt introduced; and the period of their introduction appears to have been about 30 years before the reign of Queen Anne. 6 Mod. 30. 2 Anne.

A Promiſſory Note may be defined to be an engagement in writing to pay a certain ſum of money mentioned in it, to a perſon named, or to his order, or to the bearer at large; and at firſt theſe notes were conſidered only as written evidence of a debt; for it was held that a Promiſſory Note was not aſſignable or indorſible over, within the cuſtom of merchants, to any other perſon, by him to whom it was made payable; and that if, in *fact*, ſuch a note had been indorſed or aſſigned over, the perſon to whom it was ſo indorſed or aſſigned, could not maintain an action within the cuſtom againſt the perſon who firſt drew and ſubſcribed the note; and that within the ſame cuſtom even the perſon to whom it was made payable could not maintain ſuch action. But at length they were recognized by the legiſlature, and put on the ſame footing with *inland* Bills of Exchange, by a ſtatute which enacts, "That from the firſt of May, 1705, all notes in writing made and ſigned by any perſon or perſons, body politic or corporate, or by the ſervant or agent of any corporation, banker, goldſmith, merchant, or trader, uſually intruſted by him, her or them, to ſign ſuch Promiſſory Notes by him, her or them, whereby ſuch perſon or perſons, body politic or corporate, his, her or their ſervant or agent as aforeſaid, doth or ſhall promiſe to pay, to any other perſon or perſons, body politic and corporate, his, her or their order, or to bearer, any ſum of money mentioned in ſuch note, ſhall be taken and conſtrued to be, by virtue thereof, due and payable to any ſuch perſon or perſons, body politic and corporate, to whom the ſame is made payable; and alſo every ſuch note ſhall be aſſignable or indorſible over in the ſame manner as Inland Bills of Exchange; and that the perſon, &c. to whom ſuch ſum is by ſuch note made payable, may maintain an action for the ſame, in the ſame manner as they might do on an In-

Vid. 1 Salk. 129. 2 Lord Raym. 757, 759. and preamble to 3 & 4 Ann. c. 9.

3 & 4 Ann. c. 9. made perpetual by 7 Ann. c. 25. ſ. 3.

"land

" land Bill of Exchange, made or drawn according to the
" cuſtom of merchants, againſt the perſon or perſons, body
" politic and corporate, who or whoſe agent ſigned the ſame
" and that any perſon, &c. to whom ſuch note is indorſed or
" aſſigned, or the money therein mentioned, ordered to be
" paid by indorſement thereon, may maintain an action
" for ſuch ſum of money, either againſt the perſon, &c. who
" or whoſe agent ſigned ſuch note, or againſt any of the per-
" ſons who indorſed the ſame, in like manner as in caſes of
" Inland Bills of Exchange."

PROMISSORY NOTES are in theſe forms.

£. 10.

London, December 15, 1789.

I promiſe to pay G. F. or bearer, on demand Ten Pounds, for value received.

S. R.

£. 30. 12. 6.

London, January 1, 1790.

Two months after date, we or either of us promiſe to pay to Mr. C. B. and Co. or order, Thirty Pounds Twelve Shillings and Sixpence, value received.

D. E.
G. K.

23 G. III. c. 49. ſ. 14.

FORMERLY theſe Notes and Bills were written on plain piece of paper unſtamped; but by a late ſtatute, every piece of vellum, parchment, or paper, on which Bills and Notes, falling under certain deſcriptions, ſhall be written, engroſſed, or printed, ſhall *firſt* be ſtamped according to the directions of that act; and if ſuch Bills or Notes ſhall be written, engroſſed, or printed, *before* the paper, &c. on which they are written, &c. be ſtamped; or if they be written, &c. on paper, &c. ſtamped for a lower duty than by that act directed, they ſhall not be pleaded or given in evidence in any court, or admitted in any court to be good or available in law or equity.

YET though the Bill or Note be written *before* the paper be ſtamped; it may *afterwards* be ſtamped on payment of the ſum of £. 10, and then it ſhall be admitted as good and available in any court of law or equity. 23 G. III. c. 7. ſ. 7.

No Bill of Exchange, Promiſſory Note, or other Note, Draft, or Order, payable on *demand*, in which the ſum for which it is given ſhall not amount to Ten Pounds, ſhall be charged with any duty higher than the ſum of Three-pence. 23 G. III. c. 49. ſ. 6.

ON all *other* inland Bills, Promiſſory Notes, or other Notes not amounting to the ſum of £. 50, ſhall be charged a duty of Six-pence. ſ. 2.

WHERE the ſum amounts to £. 50 or upwards, there ſhall be charged a duty of One Shilling.

BUT no *foreign* Bill of Exchange, Promiſſory Note, or other Note, Draft, or Order, drawn *here*, ſhall be charged with any higher ſtamp duty than Six-pence. But every duplicate and triplicate of ſuch foreign bill, &c. ſhall alſo be chargeable with the like ſtamp duty of Six-pence. ſ. 8.

Foreign Bills drawn *abroad*, and payable here, are evidently not ſubject to any duty *.

THESE duties ſhall be paid by the perſon making or giving the Bill or Note. ſ. 12.

BUT no ſtamp-duty ſhall be required on any Draft, Order, or Note, which may *legally* be given, in which the ſum expreſſed or made payable ſhall not amount to Forty Shillings. 24 G. III. c. 7. ſ. 4. vid. cap. II. infra.

* The Statute 23 G. III. c. 49. ſ. 2. ſays *any* foreign or inland bill, &c. ſhall be charged with the reſpective duties of ſix-pence and one ſhilling; but this is evidently repugnant to the proviſo in ſ. 8. recited in the text: it is alſo evident that this ſ. 2. cannot be conſtrued to charge any *foreign* bill *drawn abroad* and payable here with any duty: 1ſt, becauſe the legiſlature of this country cannot bind the ſubjects of any *other* country: 2dly, becauſe ſ. 12. enacts that the duty ſhall be paid by him who *gives* the bill: 3dly, becauſe ſ. 14. requires that the paper, &c. ſhall be ſtamped before the bill is made: 4thly, becauſe by ſtat. 24. G. III. c. 7. ſ. 1. a penalty of £. 5 is impoſed on any perſon writing or ſigning a Bill or Note on unſtamped paper.

AND

23 G. III. c. 49. ſ. 9. AND all Promiſſory and other Notes and Bills iſſued by the Bank of England ſhall be exempted from any ſtamp duty, on conſideration of the governors and company paying into the receipt of his Majeſty's Exchequer, the annual ſum of £. 12,000 by half yearly payments.

23 G. III. c. 49. ſ. 4. 24 G. III. c. 7. ſ. 3. NOR ſhall any duty be charged on any draft or order for the payment of money to the *bearer* on demand, on any banker or perſon acting as a banker, within ten miles of the place of abode of the perſon drawing ſuch draft or order.

BUT ſuch drafts or orders as ſhall not be made payable to the *bearer*, ſhall be chargeable with the duties in the ſame manner as Bills of Exchange and Promiſſory Notes.

24 G. III. c. 7. ſ. 1. EVERY perſon who ſhall write or ſign, or cauſe to be writtten or ſigned, any Bill of Exchange or Promiſſory or other Note, on any piece of vellum, parchment, or paper without the ſame being firſt duly ſtamped, ſhall forfeit and pay the ſum of five pounds.

ſ. 9. AND any juſtice of peace reſiding near the place where the offence is committed, is authoriſed and required, on any information exhibited, or complaint made, to ſummon the party accuſed, and the witneſſes on either ſide; and on due proof made, to give judgment for the penalty, and to iſſue his warrant for levying it on the goods of the offender; and unleſs they be redeemed within ſix days, to cauſe a ſale to be made of the goods taken under the warrant, rendering to the party the overplus, if any; and if goods cannot be found ſufficient to anſwer the penalty, to commit the offender to priſon, there to remain for the ſpace of three months, unleſs ſuch pecuniary penalty ſhall be ſooner paid and ſatisfied: but the juſtice may mitigate the penalty as he ſhall think fit (reaſonable coſts and charges of the officers and informers, as well in making the diſcovery as in proſecuting the ſame being always allowed, over and above ſuch mitigation) ſo as ſuch mitigation do not reduce the penalty to leſs than a moiety over and above the ſaid coſts and charges.—Provided that any one, who ſhall feel himſelf aggrieved by the judgment of ſuch juſtice, may, on giving ſecurity to the amount of ſuch penalty, together with ſuch coſts as ſhall be awarded

in caſe ſuch judgment ſhall be affirmed, appeal to the next general quarter ſeſſions for the county, riding, or place, which ſhall happen after fourteen days next after ſuch conviction ſhall have been made, and of which appeal reaſonable notice ſhall be given, who are hereby impowered to ſummon and examine witneſſes upon oath, and finally to hear and determine the ſame; and if the judgment be affirmed, the court may award the perſon or perſons to pay ſuch coſts occaſioned by ſuch appeal, as to them ſhall ſeem meet.

And if any one, being ſummoned to give evidence before the juſtice, ſhall refuſe to appear, (his reaſonable expences being firſt paid or tendered) without a reaſonable excuſe to be allowed by ſuch juſtice; or appearing, ſhall refuſe to give evidence, every ſuch perſon ſhall forfeit the ſum of forty ſhillings, to be levied in the ſame manner as directed with reſpect to the other penalties. ſ. 10.

Provided, that complaints on any offence againſt this, or either of the former acts relative to the ſame ſubject, be made within a year after the offence committed. ſ. 12.

CAP. II.

Who may make a Bill of Exchange *or* Promissory Note, *and be Parties in the Negociation of them.*

BILLS of Exchange having been firſt introduced for the convenience of commerce, it was formerly thought that no perſon could draw one, or be concerned in the negociation of it, who was not an actual merchant: but the multiplied concerns of ſociety rendering it neceſſary for others, not at all engaged in trade, to adopt the ſame mode of remittance, it has been ſince decided that any perſon capable of binding himſelf by a contract, may draw or accept a bill of exchange, or be in any way engaged in the negociation of it, and ſhall be conſidered as a merchant for that purpoſe; and that it is not neceſſary in a declaration on a bill, to aver, that the defendant is a merchant. Vid. Stat. 5 R. II. c. 2. Lutw. 891, 1585. Carth. 82. 2 Vent. 292. Comb. 152. 1 Show. 125. 2 Sho. 501. Lutw. 1585. 12 Mod. 36, 380. Salk. 126.

3 & 4 Ann. c. 9.

ON the ſame principle, ſince the ſtatute of Queen Anne any man, though not a merchant, may be party to a Promiſſory Note.

AN infant, or one under the age of twenty-one, cannot be engaged in trade, and therefore, it being impoſſible that the fiction or ſuppoſition, of being a merchant, ſhould extend to him, it has been determined that he cannot be ſued on a Bill of Exchange, drawn in the ordinary courſe of buſineſs; and though it does not appear to have ever been expreſsly decided that he cannot be ſued on a Promiſſory Note, yet as the ſame principle extends to the one as to the other it is evident he cannot:

Carth. 160.

Co. Lit. 172. a.

BUT as an infant *may* contract for neceſſaries, or for his education ſuitable to his rank in life, it may admit of ſome doubt whether a Bill of Exchange or Promiſſory Note given by him for either of theſe conſiderations, and expreſſed ſo to be in the body of them, would not bind him; for though it be certain that even for *theſe* he cannot bind himſelf by bond or other writing with a penalty, yet it has been frequently determined, that a ſingle bond, that is, one *without* penalty, given by an infant for neceſſaries, will bind him; unleſs the circumſtance of the making a Bill of Exchange or Promiſſory Note, being a mercantile tranſaction, and of the total incapacity of an infant to be a merchant, be a ſufficient reaſon for conſidering *any* Bill or Note in which an infant is concerned as invalid againſt him, there ſeems no reaſon why either, really given and expreſſed to be given by him for neceſſaries, may not be conſidered as equally binding with a ſingle bond: for if it be ſaid that the jury muſt inquire whether the articles mentioned as neceſſaries be really ſo or not, and into the reaſonableneſs of the price, and therefore may give a leſs ſum than that mentioned in the Bill or Note, it may be anſwered, that theſe objections hold equally againſt a ſingle bond.

Vid. March. 145. 1 Ro. Abr. 729. Pl. 8. & 1 Lev. 86.

Vid. 1 Term. Rep. 40. Trueman v. Hurſt.

AN infant however may certainly ſue on a Bill or Note for that is for his benefit.

A MARRIED woman, in general, can bind herſelf by contract; nor can ſhe, without a ſpecial authority,

her husband, except it be for such necessaries as are suitable to his rank: it is therefore clear that a Bill of Exchange or Promissory Note to which she is a party is of no force.

But there are cases in which a married woman is considered as having an existence independent of her husband, and then she may contract and be bound by her contract as if she were single; and in such cases she may, amongst other contracts, certainly be bound by a Bill of Exchange or Promissory Note.

These cases are,

1st. Where by particular custom in some places she is permitted to trade on her separate account; but in this case, if she be sued in a *superior* court, her husband must be joined for conformity, and he may plead the custom in bar. 3 Burr. 1776, 1784. 2 Bl. Rep. 1081.

2dly. Where a woman lives apart from her husband under articles of separation, has a separate maintenance, and sits and receives credit as a single woman. 1 Term. Rep. 9.

But this does not extend to the case of a woman eloping from her husband, and living apart from him. 2 Bl. Rep. 1079.

3dly. Where the husband is under a civil disability of being in the kingdom; as where he is banished, or has abjured the realm; or has been transported, though but for a term of years; or where the husband is an alien enemy, residing out of the kingdom. Co. Lit. 132. b. 133. a Sparrow v. Carruthers, cited 2 Bl. Rep. 1197. & 1 Term. Rep. 7.

Neither can a married woman, except in the foregoing cases, be the payee or indorsee of a Bill or Note, for she cannot sue, as she can possess no property in a capacity distinct from her husband. 1 Ld Raym. 147. Salk. 116.

Where there are two joint-traders, and a bill is drawn on each of them, the acceptance of one binds the other, if it concern the joint-trade, because they trade for a common benefit, and therefore where one of them gives credit, it is the act of them both: but it is otherwise if it concern the acceptor only, in a distinct interest and respect.—And if a director of an incorporated company draw a bill on such company, and any member accept it, the acceptance shall not bind the company, nor any other member of it, because it 1 Salk. 126. Gilb. L. E. 117, 118. 1 Ld Raym. 175.

is a private act of the party, and not a public act of the company.

On the same principle, if ten merchants, each in his individual capacity, employ one factor, and he draw a bill on all of them, and one accept it, this shall only bind him and not the rest, because they are separate in interest, the one from the other.

Whether a corporation, which has not a special power expressly given for the purpose, can be concerned in drawing, or accepting a Bill of Exchange or Promissory Note, or in the negociation of either, or can be made the payee, is a question which seems never to have had the consideration of a court; perhaps, because nobody has ever entertained a doubt on this head; and it seems to have been taken for granted by the legislature, and it is consistent with the general principles of law, that, by the intervention of an agent or servant lawfully authorized, a corporation, on which no restraint is imposed in its original constitution, might in this respect act as a natural person. There is, however, a proviso in this act, that no body politic or corporate shall have power, by virtue of it, to issue or give out notes, by themselves or their servants, other than such as they might have issued, if this act had not been made.—S. 3.

Vid. Edie v. East India Company. 2 Bur. 1216.

3 & 4 Ann. c. 9.

5 W. & M. c. 20. s. 28.

The Bank of England has a special power conferred on for this purpose.

Mar. 26.

It is asserted by *Marius* and others, that the wife, servant or friend of a merchant, cannot bind him by their acceptance without a power of Attorney in form; but it is a common practice for some one of a merchant's clerks, in the absence of his master, to accept bills in his name; and there is no doubt but, at this day, though there should be no instrument made to either of the before-mentioned persons, yet if either of them have formerly, in the principal's absence, usually accepted his bills, and he did not disapprove on his return, this will be as binding on him as if there had been a legal and formal instrument.

Beawes 462.

So

SOMETIMES exchange is made in the name and for the account of a third perſon, by virtue of full power and authority given by him, and this is commonly termed *procuration*; and ſuch bills may be drawn, ſubſcribed, indorſed, accepted, and negociated, not in the name or for the account of the manager or tranſactor of any or all theſe branches of remittances, but in the name and for the account of the perſon who authoriſed him. Id. Ibid.

BUT a diſcreet man will not raſhly hazard his ſubſtance by ſuch a ſubſtitution; but if obliged by the neceſſity of his affairs, will act with the utmoſt circumſpection in the choice of his agent; and when he has appointed him, he muſt adviſe thoſe correſpondents on whom ſuch agent may occaſionally want to draw, of his having given ſuch a power, and deſire them to honor the firm of his ſubſtitute, whenever uſed for his account. Id. Ibid.

AND he who by ſuch a procuration either negociates, draws, indorſes, ſubſcribes or accepts Bills of Exchange, by ſubſcribing his own name and quality, that is, as attorney of his employer, as effectually binds his principal, as if he himſelf affirmed, whilſt the procurator is not in the leaſt bound: but if any one, under *pretence* of having a full power from a perſon of credit, tranſact buſineſs on his own account, he is bound, and not the perſon whoſe name he has uſed. Id. Ibid.

THE poſſeſſor of a bill muſt admit the acceptance of a procurator, provided his letter of attorney be general, or expreſsly declaring that all bills accepted by him are on account of the principal, or limited only to thoſe bills which the poſſeſſor has; but, if the procuration be not clear and expreſs in theſe particulars, then the holder is not bound to admit the acceptance. Id. 462, 463.

CAP. III.

Of the Reſemblance which BILLS OF EXCHANGE *and* PROMISSORY NOTES *bear to one another; and of their different Kinds.*

Per Lord Mansfield in Heylin v. Adamſon. 2 Bur. 676.

A PROMISSORY Note, in its original form of a promiſe from one man to pay a ſum of money to another, bears no reſemblance to a Bill of Exchange. When it is indorſed the reſemblance begins, for then it is an order by the indorſer to the maker of the note, who, by his promiſe, is his debtor, to pay the money to the indorſee. This is the exact definition of a BILL OF EXCHANGE.

THE indorſer of the note correſponds to the drawer of the bill; the maker to the drawee or accepter; and the indorſee to the payee, or party to whom the bill is made payable.

WHEN this point of reſemblance is once fixed, the law is fully ſettled to be exactly the ſame in Bills of Exchange and Promiſſory Notes: and as ſome confuſion has ariſen in the books from an inattention to the real analogy between them, it may be proper to obſerve, that whenever the law is reported to have been ſettled with reſpect to the accepter of a bill, it is to be conſidered as applicable to the drawer, or, as he may, with more propriety, be called, the maker of a note, when with reſpect to the drawer of a bill, then to the firſt indorſer of the note: the ſubſequent indorſers and indorſees bear an exact reſemblance to one another.

BOTH bills and notes are in two different forms, being ſometimes made payable to ſuch a man or his order, or to the order of ſuch a man; ſometimes to ſuch a man or bearer, or ſimply to the bearer.

10 Mod. 286. 2 Show. 8. Comb. 401.

THE firſt kind have always been held to be negociable, that is, transferable from one man to another: but when they were made payable to the *order* of ſuch a man, exception has been taken to an action brought by that man himſelf, on the ground that he had only an authority to indorſe, but that exception was not allowed, there being no [illegible] ference

ference, according to the cuſtom of merchants, between " payable to the order of ſuch a one," and, " payable to ſuch one or order."

BILLS payable to bearer were originally thought to be equally negociable with thoſe payable to order. In the time of Charles the Second, one Hinton brought an action as bearer of a bill of this kind, againſt the drawer; no objection was made to his right to bring the action, only Lord Pemberton ſaid he muſt intitle himſelf to it on a valuable conſideration, for that if he happened to be the bearer by caſualty or knavery, he ſhould not have the benefit of it. Mar. 14. 2 Show. 235. Mich. 34. Car. 2. B. R.

BUT in King William's time, a diſtinction was taken between a bill payable to J. S. or *bearer*, and J. S. or *order*: the former, it was ſaid, was not aſſignable by the contract, ſo as to enable the indorſee to bring an action againſt the drawer or drawee, in caſe payment were refuſed, becauſe no ſuch authority was given to the party by the firſt contract, the effect being only to diſcharge the drawee if he paid it to the bearer, though the latter ſhould come by the bill by finding, theft, or otherwiſe. 3 Lev. 299. 1 Salk. 125. 1 Lord Raym. 180. Nicholſon v. Sedgwick.

IT was alſo ſaid, that dangers might ariſe, if, on a caſual loſs, the finder ſhould become intitled as bearer, to maintain an action for it.

YET it was held, that as between the indorſer and indorſee, the bill was good, and the indorſer liable to an action for the money, for that the indorſement was in the nature of a new bill.

AND even as between the bearer and the drawer, or drawee, the plaintiff alledged a ſpecial cuſtom in London or any other place, for the bearer to have this action, and the defendant demurred, without traverſing the cuſtom by which he confeſſed it, though in truth no ſuch cuſtom did exiſt, the plaintiff recovered; becauſe, ſaid the court, though we are to take notice of the law of merchants, as part of the law of England, yet we cannot take notice of the cuſtom of particular places, and the cuſtom alledged in the declaration being *ſufficient* to maintain the action, and that being confeſſed, the defendant admitted judgment againſt himſelf. 1 Salk. 126. 3 Salk. 68. 12 Mod. 36.

In equity too, it was held even then, "that a bill payable to A. or Bearer, was like ſo much money paid to whomſoever it was given; that whatever accounts or conditions might be between the party who gave the bill, and A. to whom it was given, yet it ſhould never affect the bearer, but he ſhould have his whole money." So that the whole intereſt was transferred to the bearer.

1 Salk. 126. 1 Lord Raym. 738.

And Holt held, that if a bank note were loſt, payable to A. or Bearer, and a ſtranger, who found it, transferred it to C. for good conſideration, trover would not lie againſt C. becauſe, by the courſe of trade, there is a property in the bearer.

Grant v. Vaughan. 1 Bl. Rep. 485. 3 Bur. 1516.

And in a ſubſequent caſe, which was fully inveſtigated by the court, thoſe caſes in which the diſtinction was taken between bills payable to bearer and to order, were held to have been decided on erroneous principles.

For, firſt as to their not being intended by the contract to be aſſigned: the contrary of this is true; for when made payable to A. B. or Bearer, it is clearly intended that they ſhould be transferred in the moſt eaſy manner, even without indorſement.

As to the dangers ariſing from a caſual loſs, the bearer muſt ſhew it came to him fairly, on a good conſideration, and then there is no more danger here than in loſing an indorſed Bill of Exchange, made payable to A. B. or order.

And as to any neceſſity that might be ſuggeſted of bringing the action in the name of the perſon to whom the bill was originally made payable, it may in many caſes be impoſſible, becauſe there may be no perſon originally named as the payee; many bills are payable to bearer only, without the inſertion of any perſon's name: in the very caſe before the court, which was an action againſt the drawer, by the bearer who had innocently received it for a valuable conſideration from a perſon who either found it, or became poſſeſſed of it by ſome other accident, the bill ran thus, "Pay to *Fortune* or Bearer:" however, if there were a perſon named the reaſon will not hold, for that perſon may become bankrupt; may be indebted to the drawer, ſo as to give the draw-

drawer a right to *ſet off* ſuch debt againſt the demand of the money due on the bill; may not be found; may refuſe to lend his name, or may releaſe; ſo that if the courts of law ſhould not allow the bearer to bring the action in his own name, there might be no relief at all. Beſides, this would be giving a third perſon (the drawee) an option whether he would pay it to the bearer or not, an option which might be abuſed to unjuſt or corrupt purpoſes.

WITH reſpect to Promiſſory Notes payable to *bearer*, the ſtatute of Queen Ann expreſsly makes them transferable in the ſame ſentence in which it confers that privilege on notes payable to order: and as the profeſſed intention of the ſtatute was to put Promiſſory Notes on the ſame footing with inland bills of Exchange, the legiſlature muſt evidently be taken to have ſuppoſed that bills payable to bearer had that privilege before. 3 & 4 Ann. c. 9. ſ. 5.

THERE has ſince been no doubt, but that actions may be brought by bearers of ſuch Promiſſory Notes againſt the drawers or makers. In one caſe a Bank Note ſtolen out of the mail, yet being negociated and coming to the bearer fairly on a good conſideration, was held recoverable. In another, the defendant gave a Shop Note to A. or bearer. A. loſt it, and demanded the money at the houſe of the defendant. He was ready to pay it, provided A. would give bond, with two reſponſible ſureties, (as is the cuſtom in ſuch caſes) to indemnify him againſt the bearer, if the note ſhould ever be demanded. A. not being able or willing to give that ſecurity, the defendant ſtill refuſed, on which A. brought a bill in Chancery to compel the payment, but it was diſmiſſed by Lord Hardwicke. Miller v. Race, 1 Bur. 452. Walmſley v. Child. 11 Dec. 1749. 1 Bur. 459.

So that it is now decided law that both Bills of Exchange and Promiſſory Notes payable to bearer, are equally transferable as thoſe payable to order, and the transfer in both caſes equally confers the right of action on the *bonâ fide* holder.

THE *mode* of transfer however is different; bills and notes payable to bearer are transferred by mere delivery, the others by indorſement.

THE

THE bills and notes hitherto described are considered merely as a security for money. But there is a species of each which is considered not barely as a security, but as money itself. These are bank notes, banker's cash notes, and drafts on bankers payable on demand.

Per Ld. Mansfield. 1 Bur. 457.

BANK notes are not securities, nor documents for debts, nor are they esteemed as such: but they are treated as money or cash in the ordinary course and transactions of business by the common consent of mankind, which gives them the credit and currency of money to every effectual purpose. They are as much considered as money, as guineas themselves, or any other current coin used in common payments.

Popham et al' v. Bathurst et al' in Chancery, 5th Nov. 1748.

THEY pass by a will which bequeaths all the testator's money or cash. On Lord Ailesbury's will, 900l. in bank notes was considered as money: on payment of them, whenever a receipt is required, it is given as for so much money, not as for securities or notes.

So on bankruptcies, they cannot be followed as identical and distinguishable from money.

IF they be lost indeed and found, an action will lie against the finder by the true owner, as it will also for money before it has passed in currency. But after they have come into the hands of a third person in a fair course of dealing, they can no more be recovered of him than money under the same circumstances.

17 G. III. c. 26. Wright v. Reed, 3 Term. Rep. 554.

ON the annuity act too, which requires the real consideration of the annuity to be set forth in the memorial, though the whole consideration be described as *money*, and it appear that it was part money, part bank notes, that will be sufficient, bank notes being considered as money.

Per Buller Justice, 3 Term. Rep. 554.

IT has never indeed been determined that a *tender* in bank notes is *at all events* a good tender; but if they have been offered, and no objection made on that account, the Court of King's Bench have considered it to be a good tender, because these notes pass in the world as cash: though the Lord Chancellor once suggested a doubt whether they were money.

BANKER's cash notes, and drafts on bankers, are so considered as money among merchants, that they receive

em in payment as ready caſh; and if the party receiving em, do not, within a reaſonable time, demand the money, e muſt bear the loſs in caſe of the banker's failure: but hat ſhall be conſtrued to be a reaſonable time has been ſub- ct to much doubt; it was formerly conſidered as a queſtion f fact depending on the circumſtances of the particular caſe, be determined by a jury, the nature of the thing not ad- itting of any preciſe invariable rule; but it is now eſta- iſhed to be a queſtion of law to be decided by the court, ough the preciſe time is as undetermined as before.

Hankey v. Trotman. Mich. 20 Geo. II. 1 Bl. Rep. 1.

Vide page infra.

If, however, within ſuch reaſonable time, the money be manded, and payment refuſed, he who gave the note muſt ake it good.

1 L.d Raym. 744.

A MAN received in payment a goldſmith's note, (gold- iths being then what bankers are now) at two in the ernoon, and next morning at nine preſented it at the ldſmith's, who had a quarter of an hour before ſtopt pay- ent. It was held that no credit had been given to the gold- ith, and that therefore the party who gave the note muſt ar the loſs.

1 Str. 415.

IN another caſe it appeared that the defendant had paid the intiffs, who were the Sword-blade company, two gold- ith's notes at three in the afternoon; the plaintiff's ſer- nt the next morning left the notes with the goldſmiths, in der that they might have the money ready for him as he me back a clearing; it being, as they proved, cuſtomary the Bank and the Sword-blade company to ſend out their es in the morning by their ſervant, who then left them, and led for the money as he returned in the evening; and the ldſmiths on receiving the notes always cancelled them, d got the money told out againſt the time when it was ally called for.—The notes in this caſe were brought y in the morning, and received, and cancelled: and be- en four and five in the afternoon, the ſervant who left n called again for the money, when the goldſmiths had ſtopped payment: upon which the ſervant takes new es of the ſame tenor and date with the cancelled ones ch he had left in the morning. And becauſe the plaintiffs had

1 Str. 416.

had done nothing but what was uſual, in leaving the note inſtead of taking the money on the firſt call in the morning the chief juſtice * directed the jury to find for the plaintiff which they did.

* Pratt.

Hayward v. Bank of England. 1 Str. 550.

BUT in a ſubſequent caſe this practice was diſapproved of The plaintiff, who kept caſh with the Bank, had on *Saturda* left a note for 50l. on Cox and Cleeve: on Monday they gav it to the runner, who left it at the ſhop in the morning, an when he called in the evening, he found the bankers ha ſtopped payment, on which he took a new note of the ſam tenor and date. King, C. J. who tried the cauſe, di rected the jury, that it would be dangerous to ſuffer perſon to deal with notes in this manner, and ſaid that the Court Common Pleas was of that opinion in a like caſe.

2 Str. 910.

IN Hoar and Dacoſta, it appeared that Woodward's not was paid to the plaintiff at twelve on the Friday, who put into the Bank at one; and the next morning at ten, the runn of the Bank carried it to the ſhop with other notes to th value of 2600l. and left them (as uſual) to call again for th money: he called at eleven, and they ſaid their ſervant w gone to the Bank: he called again at two, and they ſai they were going to ſhut up, and refuſed to pay; but pa ſmall notes for two hours, and then ſtopped; and the ne morning notice was given to the defendant, who had paid t note to the plaintiff.—It was inſiſted on the part of the defe dant, that he ſhould not ſuffer by the plaintiff's paying it in the Bank, who ſent it with other notes; whereas, if t note had been tendered by itſelf, it would have been pai On the other hand it was contended, that if *no* demand h been made, there would have been no laches, as the gol ſmith ſtopped payment within a day after the receipt. T chief juſtice ſaid there was no ſtanding rule, but left it to t jury, who gave a verdict in favour of the plaintiff.

Fletcher v. Sandys. 2 Str. 1248.

IN another caſe a banker's note was paid to the plain after dinner, who ſent it the next morning at nine, when t banker had ſtopped payment: and it was ruled that th was no laches in the plaintiff ſo as to fix the loſs on hi and that in all theſe caſes there muſt be a reaſonable ti allow

llowed, conſiſtent with the nature of circulating paper redit.

But in the caſe of the Eaſt-India Company againſt Chitty, appeared that at half an hour after eleven in the morning the 18th of January, the defendant being indebted to the aintiffs, paid to their caſhier a note of Caſwell and Mount, oldſmiths, in Lombard-ſtreet; they continued to pay all otes till the next day at two; and immediately after they d ſtopped payment, the company's ſervant came with the ote. On the examination of merchants it was held, that e company had made it their own, by not ſending it out e afternoon of the 18th, or at furtheſt the next morning, d there was a verdict for the defendant. 2 Str. 1175.

In a late caſe the plaintiff took the defendant's draft on his nkers, Brown and Collinſon; the next morning they opped payment, and the defendant refuſed to give caſh for s draft, alledging that if the plaintiff had preſented it for yment as ſoon as he might have done after he received it, e bankers would have paid it. Lord Mansfield ſaid that e whole reſted on cuſtom; and the queſtion to be de-rmined was, whether the plaintiff was obliged to go to the nkers on the day on which he received the draft, for if he d, it appeared he would have been paid. It was unrea-nable to ſuppoſe, that a tradeſman ſhould be compelled to n about the town with half a dozen drafts from Charing-oſs to Lombard-ſtreet, and other places, on the ſame day. he jury were to conſider that *twenty-four* hours was the ual time allowed, and the plaintiff kept it no longer from ing paid, for the next day the town was alarmed by the nkers ſtopping payment. The jury however found for e defendant; and the Court of King's Bench is ſaid to have jected an application for a new trial*. Beawes 482. Sittings at Guildhall after Eaſter Term, 1782.

On the whole, the beſt rule in theſe caſes ſeems to be, that fts on bankers, payable on demand, ought to be carried Beawes 482.

* But this appears to be a miſtake in Beawes, who reports the caſe bout a name; for all the circumſtances correſpond with thoſe of Met-e and Hall, cited in a ſubſequent part of this treatiſe, in which a new l was granted. Vid. page

for payment on the very day on which they are received, from the diſtance and ſituation of the parties that may conveniently be done; and when it is conſidered that great part of the payments for the purchaſe of ſhares in the public funds is made by the purchaſers in drafts on their bankers at the inſtant of making the transfer of the ſtock, it is certainly advisable to take the drafts for payment without delay.

CHAP. IV.

Of the Privileges of BILLS OF EXCHANGE *and* PROMISSORY NOTES, *and the Circumſtances neceſſary to make them good.*

BILLS and Notes having been introduced for the convenience of trade and commerce, are indulged with ſeveral privileges peculiar to themſelves.

WITH reference to the modes by which the performance of contracts is ſecured, by the mere act of the parties, without the operation of law, or the intervention of any legal authority, they are uſually conſidered as divided into two kinds, ſpecial and ſimple; the firſt being thoſe which are formally aſcertained by deed or inſtrument under ſeal, the inſtrument itſelf being denominated a ſpecialty; the latter, ſuch as are not aſcertained by deed or inſtrument under ſeal, but are either mere verbal agreements, in which caſe the proof of them depends on oral teſtimony alone, or are reduced into writing without ſeal, for the purpoſe of a more eaſy proof, in which reſpect only, they are better than a mere verbal promiſe.

ONE circumſtance, in which a contract by ſpecialty is more highly privileged than a ſimple contract, is, that the law allows, in its favour, a diſtinct ſpecies of action, of which the ſpecialty or inſtrument itſelf is the foundation, and in which no extrinſic facts are neceſſary to be ſtated, nor any conſideration ſhewn but what appears on the face of the deed, and where from the nature of the deed, as in the caſe of a bond, the law does not require the inſertion of any conſiderat-

Vid. 3 Bur. 1639, 1669, 1671.

ſideration, none is neceſſary to be ſet forth in the declaration; the law giving that credit to the ſolemnity of the inſtrument, which preſumes a good conſideration, and impoſing the neceſſity on the oppoſite party of ſhewing that it was improperly obtained.

But in actions founded on ſimple contracts, not only the circumſtances of the caſe muſt be particularly ſtated, but a ſufficient conſideration muſt be ſhewn, on which the obligation to perform the contract ariſes; and though the terms of the contract be reduced to writing, no reference can be made to that writing as the ſpecial ground of the action; it can only be uſed in evidence, as the proof of the contract ſtated in the declaration.

But Bills of Exchange and Promiſſory Notes, though, according to the general principles of the law, they are to be conſidered only as evidences of a ſimple contract, are yet in this reſpect regarded as ſpecialties, and are indeed on the ſame footing with bonds; for unleſs the contrary be ſhewn by the defendant, they are always preſumed to have been made on a good conſideration; nor is it incumbent on the plaintiff, either to ſhew a conſideration in his declaration, or to prove it at the trial. However, though foreign bills were always entitled to this privilege, it was not without a conſiderable ſtruggle that it was extended to inland bills; and notes are indebted for it to the ſtatute of Queen Ann.

1 Bl. Rep. 445. Peckham v. Wood, B. R. E. 18 G. III.

Vid. 2 Ld. Raym. 758. 1 Bl. Rep. 487.

The principal heads of diſtinction, under which perſonal property may be conſidered, are thoſe of things in poſſeſſion and things in action: things in poſſeſſion are thoſe objects of property, to which a man not only has a right, but which he actually enjoys; things in action are thoſe over which he has not actual dominion, but which he has only a right to recover by a ſuit at law: things in poſſeſſion might in general always be aſſigned or transferred from one perſon to another; but the jealouſy of the common law carefully guarded againſt that litigious diſpoſition, which, it was thought, might be encouraged by permitting one man to purchaſe from another his right of proſecuting a ſuit, prohibited the transfer of things in action; and even now, when the improved

2 Bl. Com. 389.

Co. Lit. 214. 2 Bl. Com. 442.

Vid. 1 Term. Rep. 26, 619.

proved ſtate of commerce requires, and the law permits, a actual aſſignment of ſuch property, ſo much reſpect is pai to the ancient principle, that the form of aſſigning it is i the nature of a declaration of truſt, and an agreement to per mit the aſſignee to make uſe of the name of the aſſignor, i order to recover the poſſeſſion: and therefore, when in com mon acceptation a debt or bond is ſaid to be aſſigned over, i muſt ſtill be ſued for in the original creditor's name; th perſon to whom it is tranferred being rather an attorne than an aſſignee.

BUT Bills of Exchange, though only ſecurities, and conſe quently things in action, are ſo highly favoured in the law that not only they are aſſignable or negociable without an fiction, but every perſon to whom they are transferred ma maintain an action, in his own name, againſt any one wh has before him, in the courſe of their negociation, renders himſelf reſponſible for their payment. The ſame privilege conferred on Promiſſory Notes by the ſtatute of Queen Ann

Per L. C. J. De Grey. 3 Wilſ. 213.

BUT, to be intitled to theſe privileges, the inſtrument writing, which conſtitutes a good Bill of Exchange accordin to the law, uſage and cuſtom of merchants, or a good No according to the ſtatute, muſt have ſome eſſential qualitie without which it can neither be the one nor the other.

Martin v. Chauntry, 2 Str. 1271.

ONE of theſe qualities is, that it ſhould be for the pa ment of money only, and not for the payment of money a the doing of ſome other act: thus a note to deliver up hor and a wharf, and to pay money at a particular day, cannot reckoned a note within the ſtatute: for theſe inſtruments bei originally adopted for the convenience of remittance, and this day conſidered only as ſecurities for the future payment money, muſt undertake only for that: and it muſt be mon in ſpecie, not in good Eaſt India bonds, or any thing e which can itſelf be only conſidered as a ſecurity.

Bull. Niſi Prius, 273. Ed. 1785.

3 Wilſ. 213.

ANOTHER requiſite quality is, that the inſtrument m carry with it a *perſonal* and certain credit, given to drawer or maker, not confined to credit on any particu fund.

B

But in the application of this principle there ſeems to be material diſtinction between Bills of Exchange and Promiſſory Notes. As to the former, where the fund is ſuppoſed to be in the hands of the drawee, the objection holds in full force, not only becauſe it may be uncertain whether the fund will be productive, but becauſe the credit is not given to the perſon of the drawer; but where the fund, on account of which the money is payable, is either in the hands of the drawer, or where he is accountable for it, the objection will not hold, becauſe the credit is perſonal to him, and the fund is only the conſideration for his giving the bill.

With reſpect to a Promiſſory Note, though in the analogy between the two ſpecies of inſtrument, when their form is inconteſtibly good, the acceptor of the bill reſembles the drawer of the note, yet with reſpect to this objection to their validity, there is a difference; for if the drawer of the note promiſe to pay out of a particular fund then within his power, the note will be good under the ſtatute: the payment does not depend on the circumſtance of the fund's proving productive or not, but there is an obligation on his perſonal credit, the bare making of the note being an acknowledgment that he has money in his hands.

This diſtinction is apparent in the following caſes—Evans drew a bill on Joſcelyne, requiring him to pay to Laſſere 7l. a month out of his *growing ſubſiſtence*, and to place it to account; Joſcelyne accepted it according to the tenor of the bill, but afterwards refuſed payment; on which Laſſere brought an action in the Common Pleas, and obtained judgment: Joſcelyne brought a writ of error in the King's Bench, on which the judgment was reverſed, becauſe it was not a bill within the cuſtom of merchants; it concerned neither trade nor commerce, and being payable out of the growing ſubſiſtence of the drawer, if he died, or his ſubſiſtence were taken away, it was not to be paid; it might never be paid, and yet his credit be unimpeached.

Joſcelyne v. Laſſere. Fort. 281. 10 Mod. 294, 316.

Jenny and others made an inſtrument in theſe words, viz. pay pay to — Herle 1945l. on demand, out of the money in your hands, belonging to the proprietors of the Devon-

Jenny v. Herle. 1 Str. 591. 2 Ld. Raym. 1361. 8 Mod. 265.

ſhire mines, being part of the conſideration money for th
manor of Weſt Buckley," and directed it to one Prat, wh
refuſed to accept it, on which Herle brought his action i
the Common Pleas as on a Bill of Exchange againſt Jenn
and the others, and had judgment; on which they brought
writ of error in the King's Bench, where the judgment w
reverſed, becauſe this was not a Bill of Exchange, but a ba
appointment to pay money out of a particular fund, and d
not anſwer the neceſſity of trade, and if the party might
charged on ſuch an inſtrument as this, then every man w
gave his ſteward an order to pay money, might be charg
as the drawer of a Bill of Exchange.

Dawkes & ux. v. Delorane. 3 Wilſ. 207. 2 Bl. Rep. 782.

THE Earl of Delorane made an inſtrument in theſe wor
"Seven weeks after date pleaſe pay to Miſs Read, thir
"two pounds and ſeventeen ſhillings out of W. Stewa
"money, as ſoon as you ſhall receive it, for

"Your humble ſervant,

"*To* TIM. BRECKNOCK, Eſq } "DELORAN
"*St. Mary-le-bone.*" }

Accepted Timothy Brecknock.

BRECKNOCK refuſed to pay, on which an action
brought againſt the drawer as on a Bill of Exchange, but ju
ment was given againſt the plaintiff for this among other
ſons, that it was payable out of a particular fund; and it b
objected at the bar, that this bill was accepted by Breckn
generally, and in an unlimited manner; it was anſwere
the court, that if the bill had been drawn accordingly
general and unlimited way, both the bill and the accept
would have been good, but the acceptance here muſt
that Brecknock accepts it to pay out of Steward's money
out of the drawer's.

Banbury v. Liſſet. 2 Str. 1211.

ON the ſame principle which governed theſe caſes, an
der from the owner of a ſhip to the freighter to pay m
on account of freight, has been held to be no Bill of
change: Gibſon the owner gave an order on Gilly and C
pany, the freighters of a ſhip, in theſe words:

M

Meſſrs. Gilly and Co.

PRAY pay Mr. *Richard Banbury*, one month after date, ool. *on account of freight* of the Veale Galley, Edward Champion, and this ſhall be your ſufficient diſcharge for the ame.

J. GIBSON.

THIS was accepted conditionally for Liſſet and Gilly, and ot being paid, an action was brought againſt the acceptors, nd among other objections to the bill, the chief juſtice ſaid Lee. at it was payable out of a particular fund; but with de- rence to ſo great an authority, it is conceived, that if that d been the only objection to the inſtrument, it would have en a good bill, for its being payable *on account of freight*, ems to be no more than a direction to the drawees to what count between them and the drawer they are to place the yment.

HOWEVER ſuch a bill from the freighters of a ſhip to any Pierſon v. her perſon, if good in other reſpects, would certainly not Dunlop. bad, becauſe it was made payable *on account of freight*, be- Doug. 571. uſe indiſputably there is a *perſonal* credit given to the wer, the words *on account of freight* only expreſſing the ſideration for which the bill was given.

AND there may be caſes where the inſtrument may appear firſt ſight to be payable out of a particular fund, and in lity be otherwiſe, of which deſcription the following caſe ne: A. B. drew a bill of Exchange, dated 25th of May, M'Leod which he requeſted M'Leod "one month after date, to v. Snee. 2 to Snee, or order, 9l. 10s. as his quarterly half pay to Ld. Raym. ome due from the 24th of June to the 29th of September 1481. 2 Str. by advance." M'Leod accepted it, and on his re- 762. Bar- to pay, was ſued in the Common Pleas, where judgment nard, 12. K. B. given againſt him, he brought a writ of error in the 's Bench, and objected to the judgment that this caſe mbled the former caſes, being payable out of a particular ; but the court held that this bill was drawn on the par- ar credit of the drawer, not on that of the half pay, for to be paid as ſoon as the quarter began, and whether ſhould ever become due or not; and the mention of the

quarterly half pay was only a direction how the drawee wa to reimburſe himſelf.

Burchell v. Slocock. 2d Ld. Raym. 1545.

OF the diſtinction taken between Bills and Notes in thi reſpect, the following is an illuſtration: "I promiſe to pa to William Burchell, the ſum of 101l. 12s. three month after date, for value received out of the premiſes in Roſemary lane, late in the poſſeſſion of Thomas Rower Sherwin: was held a good note under the ſtatute.

3 Wilſ. 213. 1 Bur. 325.

ANOTHER eſſential quality to make a good bill or note, i that it muſt be abſolutely payable at all events, and not de pend on any particular circumſtance which may or may no happen in the common courſe of things—of the applicatio of this principle the following are examples.

Haydock v. Lynch. 2 Ld. Raym. 1563.

THOMAS ROGERS made a Bill of Exchange, by which h requeſted Roger Lynch to pay to Henry Haydock, or orde the ſum of 14l. 13s. out of a fifth payment, when it ſhou become due; this was held not to be a good Bill of E change, on account of the uncertainty whether any fif payment might ever become due, as well as on account its being payable out of a particular fund.

Kingſton v. Long, B. R. M. 25 G. III. Bayley, Appendix, No. 2.

So, an order to pay money, "provided the terms me tioned in certain letters written by the drawer were co plied with," is not a good bill, though the acceptance adm a compliance with thoſe terms, for it was no bill until af ſuch compliance, and if it was not a bill when drawn, could never afterwards become one.

Ante page 34.

ITS uncertainty in this reſpect was one reaſon of the det mination in the caſe of Dawkes againſt Delorane, it bei an order to pay out of Steward's money, when receiv which might never happen.

Smith v. Boheme, cited 2 Ld. Raym. 1362, 1396.

So, a note "to pay a certain ſum of money, or to ren the body of J. S. to priſon by ſuch a day," is not a note which an action will lie by the ſtatute, after failure of r dering the body to priſon, becauſe it was not neceſſarily originally for payment of money, but only became ſo matter ex poſt facto.

So, neither is a note "promiſing to pay money, if another do not pay it within a limited time;" for this is only an eventual promiſe. Appleby v. Biddulph, cit. 8 Mod. 363. 4 Vin. 240. pl. 16.

So, a note "to pay money ſo many days after the defendant ſhould marry, is not good under the ſtatute; for it depends on a contingency which may never happen. Beardeſley v. Baldwin. 2 Str. 1151. Pearſon v. Garret. 4 Mod. 242.

So, a note "promiſing to pay to A. B. a ſum of money, value received, on the death of a particular perſon, *provided* he leave me a ſufficient ſum to pay the ſame, *or if* I ſhall be otherwiſe able to pay it," is not good within the ſtatute, becauſe it is not abſolutely payable at all events, but depends on two contingencies, neither of which may ever happen. Roberts v. Peake. 1 Bur. 323.

In the caſe of notes however, it is not neceſſary that the time of payment ſhould be abſolutely fixed; it is ſufficient, if, from the nature of the thing, the time muſt certainly arrive on which their payment is to depend.

Thus a note "to pay to A. or order, ſix weeks after the death of the defendant's father, for value received," was held to be negociable within the ſtatute, for there was no contingency, by which it might never become payable, but it was only uncertain as to the time, which it was ſaid was the caſe of all bills payable after ſight. There appears however ſome little difference, for it is in the power of the holder of a bill payable after ſight to reduce the time to a certainty. Cooke v. Colehan. 2 Str. 1217.

So, a note "payable to an infant, when he the infant ſhould come of age," and ſpecifying the time when that was to be, viz. "on the 12th of June, 1750," was held to be negociable within the ſtatute, for it would have been clearly good, if it had been made payable on the 12th of June, 1750, which is a day certain, without mentioning that the plaintiff was then to come of age, and it is not the leſs certain from the addition of that circumſtance. Per Lord Mansfield. Goſs v. Nelſon. 1 Bur. 227.

The words of engagement make the debt; and it is no objection to *another* perſon: the former part of the note is a promiſe to pay the money, and the reſt is only fixing the particular time when it is to be paid. It is ſufficient if it be

certainly, and at all events, payable at that time, whether he live till then, or die in the interim.

AND a moral certainty is ſufficient: it is not neceſſary that the time ſhould be phyſically certain.

Andrews v. Franklin. 1 Str. 24.

THUS "a promiſe to pay within two months after ſuch a ſhip ſhall be paid off," will make a good note: for the paying off of the ſhip is a thing of a public nature, and morally certain.

Evans v. Underwood. 1 Wilſ. 262, 263.

So, "I promiſe to pay to George Pratt, or order, 8l. on "the receipt of his the ſaid George Pratt's wages, due from "his Majeſty's ſhip the *Suffolk*, it being in full for his wages "and prize money, and ſhort allowance money for the ſaid "ſhip," was held a good note on the authority of the laſt caſe; and there being an averment that the wages were received, the plaintiff recovered.

BUT this ſeems to be carrying the indulgence to the notes abundantly far.

IT is obſervable that of all theſe caſes, where the time for the payment of the money is not abſolutely fixed, there is no one ariſing on a Bill of Exchange: ſuch a latitude ſeems incompatible with the nature and original intention of that inſtrument; and its allowance in favour of Promiſſory Notes ariſes entirely from a liberal conſtruction of the ſtatute on which the negociability of theſe notes is founded.

IT muſt alſo be obſerved, that in moſt of the caſes, where the ſeveral inſtruments have been denied the privilege of Bills and Notes, it is not, for that reaſon, to be concluded that they are of no force: when the fund from which they are to be paid, can be proved to have been productive, or the contingency on which they depend has happened, they may be uſed as evidence of a contract, according to the circumſtances of the caſe, or according to the relation in which the parties ſtand to one another.

Maher v. Maſſias. 2 Bl. Rep. 1072.

WILLIAM Watts, a merchant, who traded to Gibraltar employed Moſes Maſſias as his factor there, who uſed to conſign Watts's goods to certain agents in Barbary for ſale. Maſſias uſed to keep an account with the agents, and also other with Watts, but Watts had no communication with the agents. On the 21ſt of May, 1772, Watts drew a bill

in the following terms, for the balance of an account that day ſtated between him and Maber and Kentiſh, merchants, with whom he had dealings.

"SIR, pleaſe to pay to Meſſrs. Maber and Kentiſh, or order, 195l. 14s. 10d. out of the produce of goods you have of mine, now lying at Gibraltar, Barbary, and Leghorn, as ſoon as the ſame ſhall come into your hands, after diſcharging the preſent acceptances. WILLIAM WATTS."

"*To Mr. Moſes Maſſias, No. 63, Preſcot Street.*"

Which bill Maſſias accepted in the following words underwritten. "I agree to conform to this order,

MOSES MASSIAS."

BEFORE this bill was paid, Watts became a bankrupt, and Maſſias refuſing payment, an action was brought againſt him for "money had and received to the uſe of the plaintiff." On the trial it appeared that Maſſias had large quantities of goods of Watts in his hands; in 1773 to the amount of 1657l. and more in 1772. That he had paid large ſums for Watts, but whether for engagements prior to 1772 or not, did not appear.

THE defendant gave evidence of ſeveral prior engagements, but theſe did not cover the whole account; and alſo that there was at the time of acceptance, and ſtill remained, a balance due to Maſſias himſelf of 870l. There was a verdict for the plaintiff; and an application being made by the defendant for a new trial, the court obſerved that the queſtion was, whether the defendant had in his hands 195l. for the uſe of the plaintiff. He was proved to have had goods to the amount of 1657l. and that his acceptances, in the common and technical ſenſe of the words, as applied to Bills of Exchange, together with certain other indorſements by which he had engaged himſelf to pay money for Watts, left a balance in his hands more than ſufficient to pay the plaintiffs; if the balance of 870l. due to Maſſias himſelf, be excluded. For this balance, then unliquidated, it never could have been meant to provide, nor was it meant that the bill or its acceptance ſhould be ſubject to it, for then there would have been fraud in the drawer and alſo in the acceptor; both knew,

or muſt be ſuppoſed to have known, at leaſt Maſſias knew how the balance then ſtood. If he meant to have reſerved his own balance, he ſhould have made a ſpecial acceptance; but having accepted it generally in the terms of the draught, ſubject only to prior acceptances, he ſhall not ſhelter himſelf by this concealed balance due to himſelf in the courſe of a running account.

10 Mod. 287. 2 Ld. Raym, 1397. 1 Str. 629. 1 Wilſ. 263. 3 Wilſ. 213.

No preciſe form of words is neceſſary to make a Bill of Exchange, or a Note, under the ſtatute; any order which cannot be complied with, or promiſe which cannot be performed, without the payment of money, will make a good bill or note. Thus an order to deliver money, or a promiſe that ſuch a one ſhall receive it, is equivalent to an order or promiſe to pay.

Morris v. Lee. 1 Str. 629. 2 Ld. Raym. 1396. 8 Mod. 364.

A QUESTION ariſing on a note in theſe words; "I promiſe to *account* with T. S. or his order, for 5ol.;" it was objected that this importing only a promiſe to be accountable for the money, the maker was not obliged to pay it to the perſon to whom it was firſt given, or to the indorſee, but that he might account for it another way, by having laid it out in goods, or otherwiſe applied it. But the court held that a promiſe to account, was the ſame as a promiſe to pay; more eſpecially as it was to be accountable to A. or order, which implies an intention that it ſhould be negociated; and it would be a ſtrange conſtruction to ſuppoſe that the meaning could be ſatisfied in any other way than the payment of money when there might be any number of indorſees.

Chadwick v. Allen. 1 Str. 706.

NEITHER will the addition of extraneous circumſtances vitiate a note. Thus, "I do acknowledge that Sir Andrew Chadwick has delivered me all the bonds and notes for which 400l. were paid him on account of Colonel Synge, and that Sir Andrew delivered me Major Graham's receipt and bill on me for 10l. which 10l. and 15l. 5s. balance due to Sir Andrew, I am ſtill indebted for, and do promiſe to pay;" is good.

THE words "value received," being in general inſerted in Bills and Notes, there ſeems to have been ſome doubt, whether they were eſſential: in one caſe, where the want of theſe words was objected, a verdict was given on that a

Banbury, v. Leſſes. 2 Str. 1212.

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count againſt the inſtrument, but that caſe ſeems to be a very doubtful authority: in a ſubſequent caſe the ſame objection was made, but as the inſtrument was clearly defective on another ground, the court gave no opinion as to this point.

Dawkes, v. Delorane. 3 Wilſ. 207.

On ſeveral occaſions it appears to have been ſaid incidentally by the court, and at the bar, that theſe words are unneceſſary.

Fort. 282. Barnard. K. B. 88. 8 Mod. 267. 1 Show. 5. 497. 2 Ld. Raym. 1556, 1481. Lutw. 889. 1 Mod. cent. 310.

And the point is now fully ſettled that they are not neceſſary; for as theſe inſtruments are always preſumed to have been made on a valuable conſideration, words which import no more cannot be eſſential.

White v. Ledwick. B. R. H. 25 G. III. Bayley, Appendix, N. 3.

But in France, not only "value received" muſt be inſerted in Bills of Exchange, but alſo the nature of that value, in conſequence of an ordinance of the king, in March 1673, whether it was in money, merchandize, or other effects, to prevent ſeveral abuſes which had crept into this branch of commerce, by the bare inſertion only of "value received;" for it was common to give a note, in payment of a Bill of Exchange, each having theſe words: and this practice was found to be of great prejudice to trade, by occaſioning many failures, which it was the object of this ordinance to prevent; and in conſequence of it, there are four ſorts of Bills of Exchange in that country, the firſt expreſſing ſimply *value received*; the ſecond, *value received in merchandize*; the third, *value in himſelf*; and the fourth, *value underſtood*. The firſt and ſecond need no explanation, being alike in their negociation, and their diſtinction only anſwering ſome ends that may occur between the drawer and deliverer in caſe of failure or fraud. The third ſort is when a merchant draws a Bill of Exchange on one who owes him money, which he ſends to his friend or factor, to procure acceptance and payment, and as the acceptor is his debtor, an inconvenience might ariſe to him, ſhould he inſert "value received," ſimply, as his friend or factor might pretend it belonged to him, it appearing by the bill that the drawer had received the value. The fourth is when a perſon, taking a Bill of Exchange from one on whoſe credit he cannot rely, gives the drawer his acknowledgment of receiving the bill, the value

Beawes, 490.

of

of which he obliges himself to satisfy, on having advice that the bill is paid; but if the bill return dishonoured, it is again exchanged for the note, the drawer defraying the charges.

WHETHER it be essential to the constitution of a Bill of Exchange, that it should contain words which render it negociable, as "to order" or "to bearer," seems not, hitherto to have received a direct judicial decision. There are two cases in which the want of such words was taken as an exception, but as there were other objections on which the bill was in both cases held to be bad, it was not thought necessary to decide on that point.

Banbury v. Lisset. 2 Str. 1212. Dawkes v. Delorane. 3 Wilf. 212.

IN another case the same exception was taken and overruled, but under such circumstances as that the point was not generally determined. The defendant had given the plaintiff a draught on one Heddy, for the payment of a sum of money for work done by the plaintiff for the defendant; the plaintiff had neglected to demand payment for a considerable time after the draught was due: and in the mean time Heddy became insolvent. The plaintiff brought his action for work and labour, and the defendant at the trial proved his having given this draught to the plaintiff in payment. But that not being payable to the plaintiff or order, the jury considered it as not being a Bill of Exchange, and gave a verdict for the plaintiff. On an application for a new trial, the court thought it unnecessary to decide on the general question whether words importing negociability were essential to the constitution of a Bill of Exchange, because they were of opinion that by accepting the draught, and keeping it so long after it became payable, the plaintiff had given credit to Heddy, and discharged the defendant.

Chamberlyn v. Delarive. 2 Wilf. 353.

IF, in a doubtful point, however, we might be allowed to reason on general principles, it would seem, that it be the original intention and the actual use of Bills of Exchange that they should be negociable, such draughts as want the operative words are not entitled to be declared on as Bills of Exchange, however they may be sufficient as evidence to maintain an action of another kind.

THE words in the preamble to the ſtatute, which gives the ſame remedy on Promiſſory Notes as there was before on inland Bills of Exchange, include only notes payable to order; thoſe of the enacting clauſe only ſuch as are payable to order or bearer, and therefore in ſtrict interpretation would ſeem not to confer that privilege on notes wanting ſuch words, even if the want of them were no objection to inland Bills of Exchange. 3 & 4 Ann. c. 9. ſ. 1.

YET it has been ruled that ſuch words are not neceſſary in notes, and that the perſon to whom they are made payable, may maintain an action on them within the ſtatute, againſt the maker. And there are ſeveral caſes in the books of reports, where ſuch words were omitted, and no exception taken on that account. The reaſon of this indulgence to notes may be, that they have leſs reference to trade and diſtant commerce, being properly no more than engagements between party and party: and the ſtatute being remedial, the benefit of it has been extended beyond the literal words. Per Ld. Hardwicke. Moore v. Paine. B. R. H. 288. Vid. ante page.

IT having been found by experience, that trade and commerce ſuffered materially from the circulation of Bills, Notes, and Draughts for very ſmall ſums, which paſſed as caſh, and many of them being made payable under certain terms and reſtrictions with which the poorer ſort of manufacturers, artificers, labourers and others could not comply, without ſubjecting themſelves to great extortion and abuſe, the legiſlature has thought proper to lay certain reſtraints on Bills or Notes under a limited ſum. Vid. Preamble to St. 15 G. III. c. 51.

ALL Notes and Bills for the payment of any ſum under twenty ſhillings, which had been iſſued *before* the 24th of June, 1775, were made payable on demand. 15 G. III. c. 51. ſ. 8.

NOTES and Bills for leſs than twenty ſhillings, iſſued *after* the 24th June, 1775, are declared void. And any perſon publiſhing or uttering ſuch Bills or Notes, or in any manner engaged in the negociation of them, is liable to a penalty of not more than twenty pounds, nor leſs than five, to be recovered S. 1. S. 2.

covered and applied in the manner pointed out by the act
S. 13. which was to continue for five years.

17 G. III. c. 30. THE good effects of this act being found, further provisions for the same purpose were made by another two years after.

S. 1. ALL Promissory or other Notes, Bills of Exchange, or Draughts, or undertakings in writing, being negociable or transferable, for the payment of twenty shillings, or for any sum of money above that sum and less than five pounds, or on which twenty shillings, or above that sum and less than five pounds, shall remain undischarged, issued after the 1st January, 1778, shall specify the names and places of abode of the persons respectively to whom or to whose order the shall be made payable; shall bear date before or at the time of drawing or issuing them, and not on any subsequent day shall be made payable within the space of twenty-one days next after the day of the date; and shall not be transferable or negociable after the time limited for the payment: and every indorsement shall be made before the expiration of the time, and bear date at or before the time of making it, and shall specify the name and place of abode of the person or persons to whom or to whose order the money is to be paid and the signing of every such note, &c. and also every indorsement shall be attested by one subscribing witness at the least; and all notes, &c. of the above description not having these requisites shall be utterly void.

S. 2. THE same penalties, recoverable in the same way as in the former act, are imposed on every one uttering, publishing or negociating such notes, &c. without the requisites prescribed.

S. 3. AND all negociable notes, &c. issued before the 1st January, for any sum between the sum of twenty shillings and five pounds, or on which twenty shillings, or less than five pounds remained undischarged, are made payable on demand.

S. 4. AND this act and the former act are continued not o

for the reſidue of the five years of the former, but alſo for other five years.

And by a ſubſequent ſtatute, both the former are made perpetual. 27 G. III. c. 16.

CAP. V.

ACCEPTANCE.

An acceptance is an engagement to pay a Bill of Exchange according to the tenor of the acceptance.

The making of a Promiſſory Note is equivalent to an acceptance of a Bill of Exchange, for it is an engagement to pay the money for which the note is given, and therefore nothing under this head is applicable to Promiſſory Notes.

The circumſtances which generally concur in the acceptance of a bill, are that the party to whom it is addreſſed, binds himſelf to the payment, *after* the bill has iſſued, *before* it has become due, and according to its tenor, by either ſubſcribing his name, or writing the word "accepts," or "accepted," or "accepted, A. B." But as a man may be bound as acceptor without any of theſe circumſtances, it may be convenient to conſider this ſubject under the following points of view.

First, with reſpect to the manner in which an acceptance may be made; ſecondly, the time of making it; thirdly, the parties by whom and to whom it is made; fourthly, its different kinds; and, fifthly, what ſhall amount to an acceptance.

I. An acceptance may be either written or verbal; if the former, it may either be on the bill itſelf, or in ſome collateral writing.

In *foreign* bills it has always been underſtood that a collateral or parol acceptance was ſufficient. Mol. 295. 300 Mar. 17. 1 Str. 648. 3 Bur. 1674.

In

Wilkinſon v. Lutwidge. 1 Str. 648.

IN an action againſt the acceptor of a foreign Bill of Exchange, it appeared that the acceptance was by a letter, in which the defendant ſaid, I will pay it, if you will firſt let me ſend to my correſpondent in Ireland. This was held as well as if the acceptance had been on the bill itſelf.

Cox v. Coleman. Mich. 6 G. II. cited B. R. H. 75.

IN another caſe it appeared that a foreign bill was drawn on the defendant, and on non-acceptance returned to the drawer; afterwards, the defendant ſaid to the plaintiff, if the bill come back I will pay it; and on the return of the bill this was held to bind him as acceptor.

9 & 10 W. III. c. 17. 3 & 4 Ann. c. 9.

BUT on account of an ambiguity in the two ſtatutes which extend the remedy for damages and coſts to inland Bills of Exchange, conſiderable doubts had ariſen with reſpect to the validity of a verbal or collateral acceptance of them.

S. 1.

THE ſtatute of William, which gives that remedy for non-payment after acceptance, requires that acceptance to be

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by ſubſcribing the Bill by the party accepting.

THE other ſtatute provides in expreſs words, that no acceptance of any inland Bill of Exchange, ſhall be ſufficient to charge any perſon whatever, unleſs it be underwritten or indorſed in writing on the bill.

* TWO chief juſtices had at different periods after the making of theſe ſtatutes, ruled that an acceptance by parol was ſufficient to bind the acceptor.

† ANOTHER had afterwards held that ſuch acceptance was not ſufficient.

Lumley v. Palmer, M. 8 G. II. 2 B. R. H. 74. 2 Str. 1000.

BUT this point is now finally ſettled by a ſolemn determination in the King's Bench in the time of Lord Hardwicke.

AN action was brought againſt the defendant as acceptor of an inland Bill of Exchange, and at the trial the acceptance appeared to have been by parol, on which the point was reſerved for the opinion of the court, and in delivering that opinion, Lord Hardwicke obſerved that the caſes of foreign bills were not applicable to the queſtion then before

* Parker C. J. in Holdſworthy v. Thicary. P. 11 Ann. B. R. and Smith v. Plunket. Mich. 11 Ann. B. R. and Raymond C. J. Scott v. Anderſon, at Ni. Pri. M. 1 G. II.

† Eyre C. J. in Reay v. Meggot at Ni Pri. in London. Hil. 7 G. C. B.

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them, as it wholly depended on the conſtruction of the acts of Parliament: the caſes on inland bills that had ariſen ſince that act were indeed in point; but it was by no means ſettled in the Court of Common Pleas, that this acceptance was not good; for that he had been informed by one of the judges of that court, that in a caſe which had lately come before them of an action againſt the acceptor of a Bill of Exchange, exception had been taken at the firſt trial, that the acceptance was not in writing, and therefore not binding. On an application for a new trial, the court being informed that the opinion of Lord Raymond was in favour of the acceptance, all inclined to the ſame opinion. No final judgment was indeed given, becauſe the defendant thought it to acquieſce in the inclination of the court.

Orm. v. Holliday, Hil. 3 G. II.

With reſpect to the acts of Parliament, it muſt be allowed, that they are both, and eſpecially the laſt, very obſcurely penned: they were made to give a remedy againſt the drawer for damages, intereſt and coſts, in caſe of non-acceptance or non-payment by the drawee, for no ſuch remedy exiſted at common law.

The firſt gave that remedy, in caſe of non-payment after acceptance, but requires that the acceptance ſhould be in writing under the bill, but no proviſion was made for the caſe of non-acceptance; the ſtatute of Ann was made to extend the remedy to that caſe: and the proviſions of the two acts had evidently a reference to that remedy only: the fifth ſection of the laſt act indeed has expreſs words, that no acceptance ſhall charge any perſon whatſoever, unleſs underwritten or indorſed; and if theſe words ſtood ſingly, it would be difficult to maintain that any remedy lay againſt the acceptor, by reaſon of a parol acceptance: but the generality of theſe words is reſtrained by the words that immediately follow; that if ſuch bill be not accepted by ſuch underwriting or indorſement, no drawer ſhall be liable to pay coſts, damages, or intereſt on that account; ſo that the firſt general words are to be underſtood to relate to charging the drawer with intereſt and coſts. Nothing is more common than for

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an act of parliament to have general words at firſt, which are afterwards reſtrained by more particular ones. And it has been ſaid that this proviſo was inſerted by the committee, when there might not be ſo much time for drawing it up clearly, as if it had been done at the firſt drawing of the act.

THE proviſo at the end of the act is alſo very material to the preſent queſtion, "that nothing in the act contained ſhall be conſtrued to diſcharge any remedy which might before have been had againſt the drawer, acceptor, or indorſer of any ſuch bill; and ſuch acceptance being clearly valid at common law, it cannot be conſtrued to be rendered void by this ſtatute.

Powell v. Monnier. 1 Atk. 717. (613.)

AND if a verbal acceptance be binding, there can be no doubt but an acceptance by letter will be ſo too.

II. The acceptance is uſually made between the time of

3 Bur. 1663. Doug. 284. 1 Atk. 715. (611.)

iſſuing the bill and the time of payment; but it may alſo be made before the bill is iſſued, or after it has become due: when it is made before the bill is iſſued, it is rather an agreement to accept, than an actual acceptance, but ſuch agreement is equally binding as an acceptance itſelf.

Jackſon v. Pigot. 1 Salk. 127. 1 Lord Raym. 364. 12 Mod. 211. Cath. 459. Mitford v. Walcot. 1 Salk. 129. 1 Ld. Raym. 574. 12 Mod. 410.

WHEN the acceptance is made after the time of payment is elapſed, it is conſidered as a general promiſe to pay the money: and if it be to pay according to the tenor of the bill, this ſhall not invalidate the acceptance, though, the time being paſt, it be impoſſible to pay according to the tenor, but theſe words ſhall be rejected as ſurpluſage.

Mal. 265. Mar. 22. Beawes, 456, 458.

III. Acceptance is uſually made by the drawee, or perſon on whom the bill is drawn, and when made before the iſſuing of the bill, is hardly ever made by any other perſon; but after the iſſuing of the bill, it frequently happens, either that the drawee cannot be found, or refuſes to accept, or that his credit is ſuſpected, or cannot by reaſon of ſome diſability render himſelf reſponſible: in any of theſe caſes, an acceptance by another perſon, in order either to prevent the return of the bill; to promote the negociation of it; or to ſave the reputation and prevent the proſecution of the drawer or of ſome of the other parties, is not uncommon: ſuch

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acceptance is called an acceptance for the honour of the perſon on whoſe account it is made, the effect of which will be more particularly explained in a ſubſequent page.

THAT engagement which conſtitutes an acceptance is uſually made to the holder of the bill, or to ſome perſon who has it in contemplation to receive it, and then the acceptor muſt anſwer to him, and to every one who either has had the bill before, or ſhall afterwards have it by indorſement: but it is frequently made to the drawer himſelf; and then it may be binding on the party making the engagement or not, according to the circumſtances of the caſe.

THE mere anſwer of a merchant to the drawer that he will "duly honour his bill," is not of itſelf an acceptance, unleſs accompanied with circumſtances which may induce a third perſon to take the bill by indorſement: but if there be any ſuch circumſtances, it may amount to an acceptance, though the anſwer be contained in a letter to the drawer. Beawes, 454. Pierſon v. Dunlop. Cowp. 572, 574. 1 Atk. 715. (611). Powell v. Monnier.

AND an agreement to accept may be expreſſed in ſuch terms as to put a third perſon in a better condition than the drawer. If one man, to give credit to another, make an abſolute promiſe to accept his bill, the drawer, or any other perſon, may ſhew ſuch promiſe on the Exchange, to procure credit, and a third perſon advancing his money on it, has nothing to do with the equitable circumſtances which may ſubſiſt between the drawer and acceptor. Maſon v. Hunt. Doug. 286. (299.)

IV. AN Acceptance is generally according to the tenor of the bill, and then it is called a general and abſolute Acceptance.

BUT it may differ from the tenor in ſome material circumſtances, and yet, as far as it goes, be binding on the acceptor.

IT may be for a leſs ſum than that mentioned in the bill: it may be at an enlarged period, which is uſually the caſe when a merchant on whom a bill is drawn has no effects of the drawer in his hands, and does not ſuppoſe he ſhall have any at the time of payment mentioned in the bill. Mar. 17, 22. Wegerſloſe v. Keene. 1 Str. 214. Mar. 21.

Walker v. Atwood. 11 Mod. 190.

So, the drawee may accept a bill which has no time men tioned for the payment, and which is held payable at ſight, pay at a diſtant period; and ſuch acceptance will bind him.

Price v. Shute, P. 33. Car. II. Beawes, 481.

A BILL was payable the firſt of January, the drawee a cepted to pay the firſt of March: the holder ſtruck out t firſt of March, and inſerted the firſt of January, and when was payable according to that date, preſented it for payme which the acceptor refuſed; on which the holder reſto the acceptance to its original form; and the court held t it continued binding.

Biſhop v. Chitty. 2 Str. 1195.

So, the acceptance may direct the payment to be made a place different from that mentioned in the bill, as at houſe of a banker; in which caſe if the holder neglect to mand payment within a reaſonable time, and the ban afterwards fail, he muſt ſtand to the loſs.

Smith v. Delafontaine, B. R. T. 25 G. III. Bayley App. No. 5.

BUT if the banker continue ſolvent, the holder is bound to prove a demand on the banker in an action aga the acceptor.

Smith v. Sear. E. 14 G. II. Buller's N. P. 270.

So alſo the acceptance may differ from the tenor of the in its mode of payment, as to pay half in money, hal bills.

Smith v. Abbot. 2 Str. 1152.

AN acceptance may alſo be conditional, as "to pay w certain goods conſigned to the acceptor, and for which bill is drawn, ſhall be ſold;" for it would affect tra factors were not allowed to uſe this caution when bill drawn on them, before they have an opportunity to diſpo the goods.

Jullan v. Shobrooke. 2 Will. 9.

So, an acceptance "on account of the ſhip Thetis wh caſh for the ſaid veſſel's cargo" is ſufficient to bind the ceptor.

Banbury v. Liſſet. 2 Str. 1212.

ON the ſame principle, an acceptance "to pay a mitted from the place where the perſon on whoſe accoun acceptance is made reſides," ſeems binding after th mittance made.

1 Term. Rep. 182.

BUT what ſhall be conſidered as an abſolute or c tional acceptance is a queſtion of law to be determined court, and is not to be left to the jury.

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A BILL was drawn in New England for a ſum of money advanced there, for the repairs of a ſhip, of which Lutwidge, the drawee, reſiding at Whitehaven, was the freighter. Wilkinſon, the holder of the bill, applied to a merchant in London, to ſend the bill to Lutwidge for acceptance: the merchant ſent it incloſed to the drawee, who by letter acknowledged the receipt, and wrote thus; "The bill which you ſent me I will pay, in caſe the owners of the Queen Ann do not; and they living in Dublin, I muſt firſt apply to them; I hope to have their anſwer in a week or ten days: I do not expect they will pay it, but I judge it proper to take their advice before I do, with which I requeſt you will acquaint Mr. Wilkinſon, and that he may reſt ſatisfied of the payment." In another letter he writes, I have not had an opportunity of ſending the bill to Ireland, but will take the firſt opportunity, and then will remit to the gentlemen concerned, according to my promiſe. The bill not being paid, an action was brought againſt Lutwidge as acceptor, in which he inſiſted that theſe letters did not amount to an abſolute acceptance, but was only conditional, to pay in caſe the owners of the Queen Ann did not; and that his promiſe to procure payment from them was in favour of the plaintiff: but the chief Raymond. juſtice thought it was rather in favour of himſelf; that the letters were a complete acceptance, and amounted to this; that he wiſhed the holder of the bill to give him time to write to Ireland, but aſſured him that at all events the money ſhould be ſecured, whether the owners of the Queen Ann payed it or not.

Wilkinſon v. Lutwidge. 1 Str. 648.

A BILL was drawn on Mathews, payable to one Lenox, or order, and by indorſement came into the hands of Sproat: Sproat's clerk preſented the bill for acceptance to Mathews, who lived in London, and who told him, "that the drawer had conſigned a ſhip and cargo to him, and another perſon in Briſtol; but as he could not then tell whether the ſhip would arrive at London or Briſtol, he could not accept at that time:" the clerk, by the conſent of Mathews, left the bill, and afterwards called, in company with his maſter, to know whether Mathews would accept the bill or not; who,

Sproat v. Mathews. 1 Term. Rep. 182.

on being preſſed, declared, "the bill was a good one, and "would be paid, even if the ſhip were loſt."

THE court held that this was only a conditional, not an abſolute acceptance. Mathews had three events in contemplation; the arrival of the ſhip at Briſtol, her arrival at London, or her being loſt: if the ſhip arrived in London, the cargo being conſigned to him, he would have effects to reimburſe himſelf; if ſhe were loſt, he had the policy of inſurance, by which he could indemnify himſelf by recovering againſt the underwriters: but if ſhe arrived in Briſtol, the cargo was conſigned to another, he would have no effects in either of the former events he meant to accept the bill; the latter he did not.

Vid. Doug. 286.

IF the acceptance be in writing, and the drawee intend that it ſhould only be conditional, he muſt be careful to expreſs the condition in writing as well as the acceptance; for if the acceptance ſhould, on the face of it, appear to be abſolute, he cannot take advantage of any verbal condition annexed to it, if the bill ſhould be negociated and come to the hands of a perſon unacquainted with the condition, and even againſt the perſon to whom the verbal condition was expreſſed, the burthen of proof will be on the acceptor.

A CONDITIONAL acceptance, when the conditions on which it depends are performed, becomes abſolute.

Pierſon v. Dunlop. Cowp. 571.

NICHOL was the captain of a ſhip of which Pierſon was the owner. The ſhip was freighted with naval ſtores. M'Lintot, who being unable to diſcharge the freight, drew a bill on Dunlop and Co. payable fifteen days after ſight to the order of Nichol, and gave Nichol a certificate or receipt for bill, aſſigned to Dunlop and Co. as a ſecurity till the Bill of Exchange ſhould be accepted: Nichol indorſed the bill, and ſent it to Pierſon, together with a letter from M'Lintot to Dunlop and Co. in which was incloſed the certificate which M'Lintot deſired them to tender at the Navy Office, and at the ſame time he adviſed them, that he had drawn on them as above. On the 2d of October, 1776, Pierſon ſent the letter, with the certificate incloſed, and alſo the Bill of Exchange, to Dunlop and Co.: when the bill was demanded

gain the next day, the defendants delivered it up, ſaying, "it would not be accepted till the navy bill was paid;" but they refuſed to deliver the navy bill, ſaying, they would receive the money themſelves. It was held that this was a conditional acceptance, which on the receipt of the money became abſolute. Nichol, the captain, had a lien on the naval ſtores for his freight; the certificate was a ſecurity for that freight; it was given into his poſſeſſion as a pledge for the money till the bill ſhould be paid. It was not ſent to Dunlop and Co. by the poſt in the uſual courſe, but was incloſed to Pierſon as his ſecurity. He was therefore not bound to part with it till the bill was accepted. Dunlop and Co. by detaining it, and ſaying that the bill would not be accepted till the navy bill ſhould be paid, undertook, on that event, to accept and pay the Bill of Exchange.

BUT if the conditions, on which the agreement to accept a bill is made, be not complied with, that agreement will be diſcharged

As, if a merchant undertake to accept bills to a certain amount, on condition that a cargo of an equal value be conſigned to him, and an order given for inſurance. If the cargo conſigned do not equal the value, he is not bound to accept. Maſon v. Hunt. Doug. 297.

V. A SMALL matter will frequently amount to an acceptance, according to the circumſtances of the caſe: thus, the merchant ſay, leave the bill with me, and to-morrow will accept it; this is an acceptance, for it gives credit to the bill, and prevents the holder from taking the neceſſary ſteps againſt the drawer. Mar. 17. Mol. l. 2. c. 10. ſ. 20. Beawes, 455. Gilb. L. E. 118. 3 Bur. 1674.

BUT if the merchant ſay, leave the bill with me, and I will look over my books and accounts between the drawer and me; call to-morrow, and accordingly the bill ſhall be accepted; this is no complete acceptance, becauſe it depends on the balance of the account, and on the merchant's having effects in his hands to anſwer it, ſo that he gives no abſolute credit to the bill. Mol. 279, 280. 3 Bac. Abr. 610. Mar. 17. Gil. L. E. 118.

ANY thing written on the bill by the drawee, not expreſſing a direct refuſal to accept, as "accepted," "preſented," "ſeen," Comb. 401.

"seen," will, if unexplained by other circumstances, amount to an acceptance.

Moor v. Withy. Trin. 10 G. III. B. R. Bul. Ni. Pri. 270.

So, a direction to a third person to pay the money is an acceptance. The drawee of a bill underwrote it thus; "Mr. "Jackson, please to pay this bill, and charge it to Mr. New-"ton's account." It was contended that this was not an acceptance, for that the party did not mean to become the principal debtor. It was only a direction to Jackson, to pay out of a particular fund. But the court held, that, the underwriting being a direction to pay the sum, it was of no importance to what account it was to be placed when paid that was a transaction between the parties themselves, and this was a sufficient acceptance.

Powell v. Monnier, 1 Atk. 717. (612.)

A BILL was sent to the drawee for acceptance; he kept for ten days before it became due without any objection; and whilst it continued in his hands, he entered it in his bill book under a particular number, and wrote the number on the bill, and at the bottom, the day when it would become due and then sent it back, refusing to accept it: it was proved that it was the common practice of the drawee to enter and mark all bills in the same manner, whether he intended to accept them or not: the court seemed to think that these circumstances alone did not amount to an acceptance.

Smith v. Nissen. 1 Term. Rep. 269.

IF a merchant be desired to accept a bill on the account of another, and to draw on a third, in order to reimburse himself, and in consequence he draw a bill on that third person, the bare act of drawing this bill will not amount to an acceptance of the other, for the party evidently shews he means only to make himself liable, in case the bill drawn by him should be accepted and paid.

Beawes, 466.

AN agreement to accept or honour a bill, will in many cases be equivalent to an acceptance, and whether that agreement be merely verbal or in writing is immaterial: If having given or intending to give credit to B. write to C. know whether he will accept such bills as shall be drawn on him on B's account, and C. return for answer that he will accept them; this is equivalent to an acceptance, and a subsequent prohibition to draw on him on B's account will

of no avail, if in fact, previous to that prohibition, the credit was been given.

White, a merchant in Ireland, desired to draw on the plaintiffs, Pillans and Rose, merchants, at Rotterdam, for 800l. payable to one Clifford, and proposed to give them credit on a good house in London for their reimbursement, or any other mode of reimbursement: the plaintiffs, in answer, desired a confirmed credit on a house of rank in London, as the condition of their accepting the bill: White named the house of the defendants as that house of rank: the plaintiffs honoured the draught, and paid the money, and then wrote to the defendants Van Mierop and Hopkins, merchants, in London, desiring to know whether they would accept such bills, as the plaintiffs should in about a month's time draw on their house for 800l. on the credit of White; the defendants agreed to honour the bill; but, before it was drawn, White failed, and then the defendants wrote to the plaintiffs, informing them that White had stopped payment, and desiring them not to draw, as they could not accept their draught. The plaintiffs however drew, holding the defendants not at liberty to withdraw their engagement. Pillans v. Van Mierop. 3 Bur. 1663.

On behalf of the defendants it was argued that the letter by which they promised to honour the plaintiffs bill imported a credit given to the plaintiffs in prospect of a future credit to be given by them to White; for the letter of the plaintiffs, to which that of the defendants was an answer, only intimated the intention of giving credit to White, on condition of a credit from the defendants, and that therefore this credit might well be countermanded before the advancement of money.—But the real transaction between the plaintiffs and White was very different from that represented to the defendants; the former had accepted White's bill a considerable time before the latter had undertaken to honour their draught, and consequently could not be considered as having been influenced by that engagement. That this transaction had been fraudulently concealed from the defendants both by White and the plaintiffs; if it had been disclosed, the defendants would have plainly seen that the plaintiffs doubted of White's suf-

ſufficiency, by their requiring a further ſecurity for a debt already contracted; and that therefore this concealment of circumſtances was ſufficient to vitiate the contract. It was likewiſe void for want of conſideration, it being like a promiſe to pay another man's debt contracted before the promiſe, which was a paſt conſideration, and therefore no more than a naked agreement, which was not ſufficient to maintain an action.

To this it was anſwered, that if indeed there were any fraud in the tranſaction, that would have been ſufficient to vacate the contract; but it was manifeſt that none exiſted here, nor were the defendants deceived into a belief that the credit to White was future: the plaintiffs letter imported only a wiſh to be informed whether the defendants would accept bills on White's account, which they, by their anſwer conſented to do. The plaintiffs did not ſeem at the time to have doubted of White's ſufficiency, or to have meant to conceal any thing from the defendants. The draught of White on the plaintiffs payable to Clifford was no part of the conſideration of the engagement of the defendants; that and all the precedent correſpondence, was intirely out of the caſe. By promiſing to honour the plaintiffs draughts, the defendants admitted that they either had effects of White in their hands, or that they had credit on him. There was no pretence for the objection of this being a naked agreement; whatever might be ſaid in other caſes of a naked agreement or the want of conſideration, there was no ſuch thing in the cuſtom of merchants with reſpect to Bills of Exchange. The true reaſon why the acceptance of a Bill of Exchange does bind, is not on account of the acceptor's having or being ſuppoſed to have effects in his hands, but from the conveniency of trade and commerce: the acceptance is an obligation to pay, though the acceptor have no effects of the perſon on whoſe account the bill is drawn, and though there be no conſideration. The end of the inſtitution of bills, their currency requires that it ſhould be ſo. This caſe is the ſame as if White had drawn on Van Mierop and Hopkins, payable to the plaintiffs: it would have been immaterial to the plaintiffs

whe

hether Van Mierop and Hopkins had effects of White or ot, if they had accepted his bill: what was done here amounts the ſame thing; to promiſe to give the bill due honour, is effect, to accept it: if a man agree to do the formal part, e law, in the caſe of an acceptance of a bill, conſiders it as ctually done: the defendants could not afterwards retract; it ould be deſtructive to trade and credit if they might. There no analogy between this caſe and a promiſe to pay anher man's debts already contracted. It is a tranſaction of uite a different nature. If a conſideration were neceſſary, ere is here a ſufficient one. Any damage to another, or rbearance or ſuſpenſion of the aſſertion of his right, is a fficient foundation for an undertaking, and will make it nding, though no actual benefit accrue to the party who dertakes. Here the engagement of the defendants occaoned a poſſibility of loſs to the plaintiffs: it is plain they ould not rely on White's aſſurance alone, and therefore ey wrote to the defendants to know if they would honour eir draught: by engaging to do ſo, they prevented the aintiffs from calling on White to perform his agreement, giving them credit on a good houſe in London for a reimburſement. The ſuſpenſion of the plaintiffs' right, to call on hite for a compliance with his agreement, is a conſideran ſufficient to maintain an action, if that ſuſpenſion be only a day, or for ever ſo ſhort a time.

If a bill be drawn on a ſervant, with a direction to place e money to the account of his maſter, and the ſervant acot it generally, this renders him liable to anſwer perſonally an indorſee,

A BILL of Exchange was drawn in this manner; "At thirty Thomas v. Biſhop. 2. Str. 955. B. R. H. 1. ys ſight, pay to John Somerville, or order, 200l. and place ſame to the account of the York buildings company, value aived by yours, Charles Mildmay." Directed to Mr. mphrey Biſhop, caſhier of the York buildings company, their houſe in Wincheſter-ſtreet, London. "Accepted, H. ſhop, 13th June, 1732. This bill was indorſed to Thomas, o brought an action againſt Biſhop as the acceptor. At trial the defendant proved, that the letter of advice was ad-

dreſſed to the Company; and that the bill being brought to their houſe, he was ordered to accept it, which he did in the ſame manner as he had accepted other bills: but it was determined that this evidence was immaterial. The bill, on the face of it, imported to be drawn on the defendant; it was accepted by him generally, not as ſervant to the company to whoſe account he had no right to charge it, till actual payment by himſelf: and this being an action by an indorſee, it would be of dangerous conſequence to trade to admit evidence, ariſing from extrinſic circumſtances, ſuch as the letter of advice. This differed widely from the caſe of a bill addreſſed to the maſter, and ſubſcribed by the ſervant. A Bill of Exchange is a contract by the cuſtom of merchants, and the whole of that contract muſt appear in writing; there is nothing in writing here to bind the company, nor can any action be maintained againſt them upon the bill, for the addition of caſhier to the defendant's name, is only to denote the perſon with more certainty; the houſe of the York building's company, is to inform the indorſee where the drawee is to be found, and the direction to whoſe account to place the money is for the uſe of the drawee only. It might have been otherwiſe had the action been by the payee, who was privy to the tranſaction, and if it had appeared that he tendered the bill as a bill on the company: but this plaintiff being a ſtranger thoſe circumſtances could not be conſidered.

CAP. VI.

Transfer of BILLS *and* NOTES.

ACCORDING to the difference in the ſtile of negotiability of Bills and Notes, the modes of their transfer differ.

Bills and Notes payable to bearer are transferred by delivery: if payable to J. S. or bearer, they are payable to bearer as if J. S. were not mentioned.

1 Bur. 452. 3 Bur. 1516. 1 Bl. Rep. 485.

BUT to the transfer of thoſe payable to order, it is neceſ-
y, in addition to delivery, that there ſhould be ſomething by
hich the payee may appear to expreſs his order. This ad-
ional circumſtance is an indorſement, ſo called from being
ually written on the back, though without doubt an order
transfer would be equally valid, if written at the bottom or
the face of the inſtrument.

WHERE no regulation is made by act of parliament rela-
e to the negociation of Bills or Notes, no particular form
words is neceſſary to make an indorſement, only the name
the indorſor muſt appear upon it, and it muſt be written
ſigned by him, or by ſome perſon authorized by him for
at purpoſe.

INDORSEMENTS are either in full or in blank; a full in-
ſement is that by which the indorſor orders the money to
paid to ſome particular perſon by name. A blank indorſe-
ent conſiſts only of the name of the indorſor.

A BLANK indorſement renders the bill or note afterwards
nſferable by delivery only, as if it were payable to bearer,
by only writing his name, the indorſor ſhews his inten-
n that the inſtrument ſhould have a general currency, and
transferred by every poſſeſſor. Doug. 617. (639.) 611. (633.)

BLANK indorſements are more frequent than thoſe in full,
auſe, if every indorſement were in full, the back of the in-
ument would be ſoon filled up, and its negociability would
leſs extenſive.

EXCEPT where reſtrained by act of parliament, the transfer
a bill or note may be made at any time after it has iſſued,
n after the day of payment; and in caſe of the former,
ere the acceptor reſides at a diſtance from the drawer, is
quently made before acceptance. 1 Lord Raym. 575. Vid. 3 Term. Rep. 80. Vid. 3 Bur. 1516. 1 Bl. Rep. 485. Doug. 611. (633.)

AND where the transfer is by indorſement, that indorſe-
nt may be made on a blank note, before the inſertion of
date or ſum of money, in which caſe, the indorſor is
le for any ſum, at any time of payment, that may after-
ds be inſerted; and it is immaterial whether the perſon
ing the note on the credit of the indorſement knew whe-
r it was made before the drawing of the note or not; for

in

ſuch a caſe the indorſement is equivalent to a letter of cre
for any indefinite ſum.

Ruſſel v. Langſtaffe, Doug. 496. (514.)

ONE Galley having had frequent money tranſactions wi
Ruſſel, a banker, and having overdrawn his caſh account
Ruſſel ſuſpecting his credit, refuſed to advance him any mo
money, without the addition of the name of ſome indorſor
whom he ſhould approve: on this Galley applied to Lan
ſtaffe, who indorſed his name on five copper plate check
made in the form of Promiſſory Notes, but in blank, that
without any ſum, date, or time of payment, mentioned in t
body of the notes. Galley afterwards filled up the blan
with different ſums and dates, and Ruſſel diſcounted th
notes. Galley became a bankrupt, and Ruſſel demande
payment of Langſtaffe, and on his refuſal brought an actio
in which the court thought he was intitled to recover, thou
it appeared that he knew the notes were blank at the time
the indorſement.

Bank of England v. Newman. 1 Ld. Raym. 442. 12 Mod. 241. Lambert v. Pack. 1 Salk. 128. 7th reſolution.

IT is ſaid that on a transfer by delivery, the perſon maki
it, ceaſes to be a party to the bill or note; that ſuch a transf
is a ſale, and that he who ſells it, does not become a new
curity, and is not liable to refund the money if the bill ſho
not be paid.

BUT this can only be true, when applied to the caſe o
demand by a ſubſequent party when ſeveral have interve
between him and the party againſt whom he makes the d
mand; it can never apply in its full extent as between t
immediate parties to the transfer: for though the perſon w
has given the money for the bill or note cannot recover aga
the perſon who received it, as indorſor, yet he may certai
recover in an action for money had and received for his
as the transferer muſt be underſtood to undertake that the
ſhall be duly paid.

Clark v. Pigot. 1 Salk. 125. Peters v. Harriot, 1 Show. 163. Lambert v. Pack. 1

THOUGH a blank indorſement be a ſufficient transfer,
may enable the perſon in whoſe favour it is made to ne
ciate the inſtrument, yet it is in his option to take it e
as indorſee or as ſervant or agent to the indorſor, and
latter may, notwithſtanding his indorſement, declare as he

an action againſt the drawer or acceptor. Nothing is more ſual than for the holder of a bill or note, to indorſe it in lank, and ſend it to ſome friend for the purpoſe of procuring e acceptance or the payment; in this caſe, it is in the ower of his friend, either to fill up the blank ſpace over the ndorſor's name, with an order to pay the money to himſelf, hich ſhews his election to take as indorſee, or to write a eceipt, which ſhews that he is only the agent of the in-orſor.

Salk. 128. 6th reſolution. Lucas v. Haynes, 1 Salk. 130. 2 Lord Raym. 871.

ON this principle, a man to whom a bill was delivered ith a blank indorſement, and who carried it for acceptance, as admitted, in an action of trover for the bill againſt the rawee, to prove the delivery of it to the latter.

Lucas v. Haynes. 1 Salk. 130. 2 Ld. Raym. 871.

THE original contract on negociable Bills and Notes is to y to ſuch perſon or perſons, as the payee or his indorſees, or eir indorſees, ſhall direct; and there is as much privity be-ween the laſt indorſor and the laſt indorſee, as between the rawer and the original payee. When the payee aſſigns it ver, he does it by the law of merchants; for as a thing in ction, it is not aſſignable by the general law. The indorſe-ent is part of the original contract, is incidental to it in the ture of the thing, and muſt be underſtood to be made in the ne manner as the inſtrument was drawn: the indorſee holds in the ſame manner, and with the ſame privileges, qualities, d advantages as the original payee, as a transferable nego-ble inſtrument, which he may indorſe over to another, and t other to a third, and ſo on at pleaſure; and therefore an dorſor, where he indorſes it for a valuable conſideration, can-t limit his indorſement by any reſtriction on the indorſee, as to preclude him from transferring it to another as a ing negotiable.

2 Bur. 1226.

ON theſe principles it has been ſeveral times ſolemnly tled, that it is no objection to the claim of an indorſee, t the indorſement to him does not contain the words "to der."

IN one caſe it appeared that Manning had given a omiſſory Note to Statham or order; Statham aſſigned to Witherhead, and Witherhead to More, who, on non-

More v. Manning. Comyns 211. in C. B. Hil. 6 G. I. cited 2 Bur. 1222.

non-payment at the time, brought an action against Ma
ning: on a demurrer to the declaration, exception was tak
that the assignment to Witherhead was made without say
to him or order, and that therefore he could not assign it o
to More. But it was held by the whole court that the
dorsement was sufficient; for if the original note be assi
able, then, to whomsoever it may be assigned, he has the wh
interest in it, and may assign it as he pleases; an assignment
him comprehends his assigns.

Acheson v. Fountain. Mich. 9 G. I. B. R. 1 Str. 457, cited 2 Bur. 1223.

In another case the plaintiff had declared on an indo
ment made by William Abercrombie, by which he appoin
the payment to be to Louisa Acheson, "or order"; on
bill being produced in evidence, it appeared to be origin
made payable to Abercrombie or order, but Abercromb
indorsement was only this; "pray pay the contents to Lo
Acheson." It was objected "that the indorsement did
agree with the declaration." The court however gave ju
ment on the ground of a general proposition in law, th
bill is negociable without the addition of those words to
indorsement; the legal import of such indorsement being
the bill was payable to order, and that the plaintiff might
this have indorsed it over to another, who would have
the proper order of the first indorsor.

Yet notwithstanding these cases, the same point was
agitated on the following occasion.

Edie v. East-India Company 2 Bur. 1216. 1 Bl. Rep. 295.

Colonel Clive drew a bill payable to Mr. Cambell
order, on the East-India company, who accepted it;
Cambell indorsed it to Mr. Robert Ogilby, but the w
"or order" being originally omitted, were afterwards
serted by another hand before the trial: Ogilby indorse
over to Messrs. Edie and Laird, or order, and afterwards
fore the payment, became insolvent: Edie and Laird bro
an action against the company as acceptors, who refused
ment, on pretence that Ogilby had no right to assign t
plaintiffs: the real question was, who should bear the
Mr. Cambell or the plaintiffs, for the East-India com
if they did not pay to the plaintiffs, must pay to Mr.
bell.

At the trial Lord Mansfield permitted the defendants to give evidence of a *usage among merchants*, that an indorsement to any individual by name, without the words, "or order," destroyed the negociability of the bill, and confined the right of recovery to that individual person: this usage was proved by a number of witnesses; but no instance was shewn where the indorsee, to whom a bill was indorsed without adding the words, "or order," ever actually lost the money, so as to put him on disputing the point. His lordship, in his address to the jury, told them, that, laying the usage out of the case, by the general law, the indorsement would follow the nature of the original bill, and be an absolute assignment to the indorsee or his order: but that he left it to them, on the particular evidence of the usage that had been laid before them; that if they found an usage so established and settled amongst merchants and traders as to be clear and plain beyond all doubt, they might find a verdict for the defendant, but that if they were doubtful of the usage, or if it appeared to them not to be fully and clearly established, or to be the other way, then they ought to find for the plaintiff.

That the question arose on the insolvency of Ogilby, the first indorsee; that therefore it ought to be considered who it was that gave credit to him, for that he who gives the credit ought to run the risk: that if Mr. Cambell meant to trust Ogilby with the money, it was he who ought to suffer by it; and that he meant to trust him was clear; for it was acknowledged on all hands, that Ogilby himself had a right to receive it of the company, whether he had a right to indorse the bill to another person or not.

The jury found for the defendants; and on an application for a new trial, the counsel in support of the verdict rested principally on the usage which had been established by the evidence; and with respect to the two cases before cited, they endeavoured to shew that they did not apply to the present; the first, they said, must have been an indorsement in blank, but to Witherhead by name, and then there could be no doubt of his power to transfer it: the second did not decide

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the preſent queſtion, for it was only an objection on accou of the declaration varying from the evidence: the plaint had clearly a right to recover, without entering into t general queſtion, for ſhe was the perſon to whom the b was indorſed, and had not indorſed it over; and what the cou was reported to have ſaid, "as to her power to have indorſ it to another who would be the proper order of the firſt i dorſor," was at leaſt extrajudicial, if not added by the r porter himſelf: but the court, on full deliberation, were opinion that the law was ſettled by thoſe two caſes, that ſu an indorſement was good, and gave the indorſee a right indorſing over: that the law having been ſo ſettled, no e dence of an uſage contrary to it ought to have been admitt that the law of merchants is the law of the kingdom, a part of the common law, and when once eſtabliſhed by j dicial determinations, cannot be ſhaken. Where indeed t law of merchants is doubtful, the evidence of a cuſtom m be received; but even then it muſt be proved by facts, n by opinion only, and muſt be conſiſtent with the gen principles of the law.

2 Bur. 1227. Doug. 617. (639.)

YET an indorſement may be reſtrictive; and then it opera to preclude the perſon to whom it is made from transferri the inſtrument to another, ſo as to give him a right of acti either againſt the perſon impoſing the reſtriction, or agai any of the preceding parties; it may give a bare authority the indorſee to receive the money for the indorſor; as if ſay, "pray pay the money to ſuch a one for my uſe," uſe ſuch other expreſſions as neceſſarily import that he d not mean to tranſfer his intereſt in the Bill or Note, merely to give a power of receiving the money. In ſuc caſe it would be clear that no valuable conſideration had b paid, but the intention of reſtraint muſt appear on the f of the indorſement.

Doug. 617. (640.)

So, if the payee direct by indorſement, that "the wit muſt be credited to the account of a third perſon." Thi not a tranſfer of the bill to that third perſon, but only an thority to the drawees to give him credit for ſo much;

yee does not mean to make himſelf liable as indorſor, or to able the other to raiſe money on the bill.

AND, if in ſuch a caſe the drawee accept the bill, inſtead of ncelling it, and an indorſement be forged and the bill ne-ciated, the party who ſhall advance money on it muſt ſtain the loſs; and if afterwards a friend of the drawer, by ſtake, pay the bill for his honour, the drawer may recover k the money, in an action for money had and received to uſe; for it was the duty of the party advancing the money the bill to read the ſpecial indorſement, and he muſt er for his negligence.

THUS, where a bill was drawn by a houſe in Denmark on Ancher v. Bank of England. Doug. 615. (637.) houſe in London, payable to a perſon reſiding in Denmark, his order, and the payee made ſuch a ſpecial indorſement; drawees accepted and gave notice to the drawers and to perſon in whoſe favour the indorſement was made, that had received the bill, and placed it to the account of the er; the clerk of the acceptors forged an indorſement to ſelf or order, from the perſon to whoſe account the money to be credited, and diſcounted it at the Bank; the ac-tors failed before the day of payment, and a friend of the wers went to the Bank and paid the bill for their honour: drawers afterwards recovered back the money from the k, on the ground that this ſpecial indorſement reſtrained negociability of the bill, and that the money was paid by take.

an indorſement be made in favour of an infant, and he orſe it to another, no recovery can be had on that indorſe-t againſt the infant, becauſe he cannot render himſelf e by his contract; yet, as it is to be preſumed, unleſs contrary appear on the face of the indorſement, that indorſee has given a valuable conſideration, the infant's rſement cannot be conſidered as ſuch a reſtraint on the ciability of the bill as to prevent the indorſee's recovery nſt the acceptor or drawer, or any of the other in-ors.

WHERE the transfer may be by delivery only, that transfer be made by any perſon who by any means, whether ac-

cident or theft, has obtained the poſſeſſion; and any holder may recover againſt the drawer, acceptor or indorſor in blank, if he gave a valuable conſideration without knowledge of the accident.

Miller v. Race. 1 Bur. 452.

A BANK note for 21l. 10s. payable to one William Finney, or bearer, on demand, was ſent by Finney under cover by the General Poſt to his correſpondent in Oxfordſhire; the mail on the ſame night was robbed, and this note among others taken and carried away by the robber; it afterwards came into the poſſeſſion of one Miller, an innkeeper for a full and valuable conſideration, in the uſual courſe of his buſineſs, without any notice or knowledge of its having been taken out of the mail. Finney hearing of the robbery, applied to the Bank to ſtop the payment of this note, which was ordered, on his entering into ſecurity to indemnify the Bank. Miller afterwards preſented the note for payment, and delivered it to Race, a clerk of the Bank, who refuſed either to pay it, or to re-deliver it. Miller brought an action of trover againſt Race, for the recovery of the note; and a caſe ſtating theſe circumſtances coming before the court, it was held that the plaintiff was intitled to recover; becauſe there appeared no circumſtance of colluſion in him; he had taken the note in the uſual courſe of his buſineſs, for a valuable conſideration, and the currency of theſe notes and the nature of trade required that the fair holder ſhould be protected even against the true owner, who could only recover them back from the finder, or any other perſon who had given no value for them.

Grant v. Vaughan. 3 Bur. 1516. 1 Bl. Rep. 485.

VAUGHAN, a merchant in London, gave to Bicknell, one of his ſhips huſbands, a draught on his banker, Sir Charles Aſgill, payable to ſhip Fortune, or bearer: Bicknell loſt the draught: the perſon who found it, or at leaſt was in poſſeſſion, however he might have obtained that poſſeſſion, went four days after the note was payable, to the ſhop of Grant a tradeſman at Portſmouth, and having bought ſome goods gave him the note in payment, and deſired to have the balance. Grant ſtepped out to make inquiry who Vaughan might be, and being informed he was a reſponſible man,

that the note was in his hand-writing, gave the change out of the note, retaining the price of the tea. Vaughan being apprized that Bicknell had loſt the note, ſent notice to Sir Charles Aſgill not to pay it. Payment being accordingly refuſed, Grant brought his action againſt Vaughan as the drawer. The cauſe was tried by a ſpecial jury of merchants, who found for the defendant. On an application for a new trial, the court held that theſe notes were transferable by mere delivery, and however the true owner may have loſt them, the fair poſſeſſor for a valuable conſideration was intitled to the money, and therefore granted a new trial.

THE ſame principle applies to the caſe of a bill negociated with a blank indorſement.

A BILL was drawn at Halifax, by Rhodes and another, on Smith, Payne and Smith, bankers, in London, payable to William Ingham, or order, thirty one days after date, for value received. Ingham indorſed it in blank; John Daltry received it from him, and indorſed it in the ſame manner, and delivered it to Joſeph Fiſher; it was ſtolen from Fiſher at York, without any indorſement by him: Peacock, a mercer at Scarborough, afterwards received it from a man unknown, who called himſelf William Brown, and by that name indorſed it to Peacock, of whom he bought cloth and other articles in the way of his trade as a mercer, and gave him that bill in payment, receiving the balance in caſh and ſmall bills: it appeared that Peacock did not know the drawers, but had, ſeveral times before that, received bills drawn by them, which were duly paid. Peacock tendered this bill for acceptance and payment to the drawees, who refuſed; on which he brought an action as the indorſee of Ingham againſt the drawers. A verdict by conſent was found for the plaintiff, ſubject to the opinion of the Court of King's Bench, on a ſpecial caſe ſtating the preceding facts. The court held that there was no difference between a bill or note indorſed blank and one payable to bearer. They both paſs by delivery, and poſſeſſion proves property in both caſes. The holder of either cannot with propriety be conſidered as aſſignee of the payee.

Peacock v. Rhodes et al. Doug. 611. (613.)

an aſſignee muſt take the thing aſſigned, ſubject to all the equity to which the original party was ſubject: if this rule were applied to Bills and Notes, it would ſtop their currency, it would render it neceſſary for every indorſee to enquire into all the circumſtances, and the manner in which the bill came to the indorſor: but the law is now clearly ſettled, that a holder coming fairly by a bill or note, is not to be affected with the tranſaction between the original parties, except in ſuch caſes as depend on particular acts of parliament.

Vid. p. 43, 44.

BUT a transfer by indorſement, where that is neceſſary, can only be made by him who has a right to make it, and that is ſtrictly only the payee, or the perſon to whom he or his indorſees have transferred it, or ſome one claiming in the right of ſome of theſe parties.

WHERE a Bill or Note is drawn in favour of two or more in partnerſhip with one another, an indorſement by one will bind both, if the inſtrument concern their joint trade: ſo where it is in favour of them *or* either of them, an indorſement by one is a ſufficient transfer, though they be not in partnerſhip.

Carvick v. Vickery. Doug. 630, (653) in the Notes.

So, where a bill drawn by two is made payable to them or their order, it would ſeem from principle, that either might transfer without the other; for when two perſons join in the ſame bill, they hold themſelves out to the world as partners, and, for that purpoſe, are to be treated as ſuch; and when a bill goes out into the world, the perſons to whom it is negociated are to collect the ſtate and relation of the parties from the bill itſelf. If they appear on the bill as partners it may be of leſs public detriment to ſubject them to the inconvenience of being treated as ſuch, than to permit them to deny that they are ſo.

BUT there is a univerſal uſage among all the bankers and merchants in London, that in ſuch a caſe, an indorſement by one of the payees only is void.

Connor v. Martin. 1 Str. 516.

IF a Bill of Exchange or Promiſſory Note be made or indorſed to a woman while ſingle, and ſhe afterwards marries, the right to indorſe it over belongs to her huſband, for by the marriage he is intitled to all her perſonal property.

If a man become bankrupt, the property of Bills and Notes of which he is the payee or indorſee, veſts in his aſſignees, and the right to transfer is in them. And if in fact he indorſe a bill or note after his bankruptcy, and that be diſcovered before it be paid, the aſſignees may recover it back from his indorſee in an action of trover, and if the money be received, they may recover the money in an action for ſo much money paid to their uſe. Beawes, 469, 470.

If he die, it devolves to his perſonal repreſentatives, his executors or adminiſtrators; and they may indorſe it, and their indorſee maintain an action, in the ſame manner as if the indorſement had been by the teſtator or inteſtate. But on their indorſement they are liable perſonally to the ſubſequent parties, and not as executors; for they cannot charge the effects of the teſtator. Rawlinſon v. Stone. 3 Wilſ. 1. 2 Str. 1260. 2 Barnes, 137, cited 2 Bur. 1225. 1 Term. Rep. 487.

They may alſo be the *indorſees* of a Bill or Note in their quality of executors or adminiſtrators; as where they receive one from their teſtator or inteſtate, and in that character they may bring an action on it againſt the acceptor or any of the other parties. King. Ex. v Thorn. 1 Term. Rep. 487. Vid. alſo 10 Mod. 315.

When a bill payable to order is expreſſed to be for the uſe of another perſon than the payee, yet the right of transfer is in the payee, and his indorſee may recover againſt the drawer or acceptor.

One Cramlington drew a Bill of Exchange on Rider, payable to Price or order, for the uſe of one Calvert. Price indorſed this bill to Evans. Rider accepted the bill, but did not pay it at the day. On which Evans, as indorſee of Price, brought his action againſt Cramlington, the drawer. Cramlington pleaded that Calvert, for whoſe uſe the money was to be paid, being an officer of Exciſe, and indebted to the King, an Exchequer proceſs had extended in the hands of the defendant, a ſum equal to that contained in the bill. Evans v. Cramlington. Eaſt. 2 Jac. 2 Carth. 5. 2 Vent. 309. 2 Show. 509.

But the court held that Calvert had only an equitable right to have the money, and could not have maintained an action againſt the acceptor; and the indorſement by Price to Evans being for value received, Price had received the very money to which Calvert had an equitable title; but the ſum demand-

ed by Evans was not that ſum, but another due to him for value given, in which Calvert was not concerned; and therefore the money in demand was not extendible in the hands of the defendant; and his plea of courſe was bad, and the plaintiff intitled to recover.

Carth. 403. AN indorſement to the order of a perſon, is of the ſame force as an indorſement to that perſon or his order, and he may maintain an action on ſuch indorſement in his own name; for among tradeſmen this form is common, though it be intended to be made payable to the perſon whoſe order is mentioned.

Carth. 466. BUT an indorſement by which *part* only of the money is ordered to be paid, is not valid to charge the drawer or acceptor; becauſe by ſuch indorſement he would be liable on one contract to as many actions as the payee or indorſor ſhould think fit.

CAP. VII.

Engagement of the ſeveral Parties.

BY the very act of drawing a bill, a man comes under an implied engagement to the payee and to every ſubſequent holder fairly intitled to the poſſeſſion, that the perſon on whom he draws, is capable of binding himſelf by his acceptance; that he is to be found at the place of which he is deſcribed to be, if that deſcription be mentioned in the bill; that if the bill be duly preſented to him, he will accept it in writing on the bill itſelf according to its tenor; and that he will pay it when it becomes due, if preſented in proper time for that purpoſe.

IN default of any of theſe particulars, the drawer is liable to an action at the ſuit of any of the parties before mentioned on due diligence being exerciſed on their parts, not only for the payment of the original ſum mentioned in the bill, but alſo in ſome caſes for damages, intereſt and coſts: and he is equally anſwerable whether the bill was drawn on his own account, or on that of a third perſon; for the holder of the

Beawes, 469.

bill is not to be affected by the circumſtances that may exiſt between the drawer and another: the perſonal credit of the drawer being pledged for the due honour of the bill.

If a man write his name on a blank piece of paper, and deliver it to another, with authority to draw on it a Bill of Exchange to any amount, at any diſtance of time, he renders himſelf liable to be called upon as the drawer of any bill ſo formed by the perſon to whom he has given the authority. Bl. Term. Rep. C. B. 313.

If the drawee do not accept, and the holder take the ſteps requiſite on his part to charge the drawer, it is ſaid the latter is bound to anſwer the money and damages, or give ſufficient ſecurity to anſwer them within double the time the firſt bill had to run. G. L. E. 118, 119, cites Mol. 281.

By the manner in which this alternative is expreſſed, it would ſeem that the drawer is not under an abſolute obligation to make immediate ſatisfaction, and that the other party muſt be contented with the latter part of it at the pleaſure of the drawer: ſuch may be the law and cuſtom in other countries, but it is certainly not ſo here; for it has often been determined, that if acceptance be refuſed and the bill returned, this is only notice to the drawer of the refuſal of the drawee; but that the period when the debt of the former is to be conſidered as contracted, is the moment he draws the bill, and an action may be immediately commenced againſt him, though the regular time of payment, according to the tenor of the bill, be not arrived. For the drawee not having given credit, which was the ground of the contract, what the drawer had undertaken has not been performed. Vid. Mar. 29. Mitford v. Mayor, Doug. 55.

On this principle it has been held, that if a man draw a bill, and commit an act of bankruptcy, and afterwards the bill be returned for non-acceptance; the debt is contracted before the act of bankruptcy, and may be proved under the commiſſion, and therefore a certificate obtained on that commiſſion will be a bar to an action on the bill: which could not have been the caſe, if the notice of non-acceptance had been the period when the debt was contracted. Macarty v. Barrow. 2 Str. 949, cited, 3 Will. 16, 17.

1 Salk. 133. 2 Show. 441, 494. 2 Bur. 674.

WHEN a Bill of Exchange is indorſed by the perſon to whom it was made payable, as between the indorſor and indorſee, it is a new Bill of Exchange; as it is alſo between every ſubſequent indorſor and indorſee; the indorſor therefore, with reſpect to all the parties ſubſequent to him, ſtands in place of the drawer, being a collateral ſecurity for the acceptance and payment of the bill by the drawee: his indorſement impoſes on him the ſame engagement that the drawing of the bill does on the drawee; and the period when that engagement attaches is the time of the indorſement.

NOTHING will diſcharge the indorſor from his engagement but the abſolute payment of the money; not even a judgment recovered againſt the drawer, or any previous indorſor, as appears from the following caſe.

Claxton v. Smith. 3 Mod. 86. 2 Show. 441, 494.

THE plaintiff, as laſt indorſee of a Bill of Exchange, brought an action againſt the laſt indorſor, who pleaded that the plaintiff had ſued and recovered againſt the original drawer, and that the judgment was ſtill in force; to this the plaintiff demurred. In favour of the defendant it was argued, that though the plaintiff might originally bring his action againſt either the drawer or any of the indorſors, yet, having made his election, he ſhould not therefore be permitted to reſort to the others, for that, it was ſaid, would deprive ſome of them of their remedies, and election was to chooſe either one or the other, and not every one ſucceſſively: and this caſe was compared to that of a treſpaſs done by ſeveral, where the party injured, having brought his action againſt one, and recovered judgment, he cannot afterwards recover damages againſt any of the others, becauſe the action is founded on uncertain damages, which being aſcertained by the firſt action cannot be brought in queſtion again.

FOR the plaintiff it was argued, that as no exception was taken to the declaration, the whole queſtion was confined to the validity of the plea. No plea can be a good bar to an action, which is not in reaſon a good anſwer to the matter charged in the declaration, nor an evaſion of it: the fact in this plea is no anſwer to the charge: the fact alledged is that a bill was drawn and directed to be paid to the defendant

hat he by indorſement ordered the contents to be paid to the laintiff: the cuſtom of merchants is, that he who indorſes r ſubſcribes a Bill of Exchange, and by ſuch indorſement or ubſcription orders the acceptor to pay the contents to an- her, becomes chargeable to pay that money himſelf, in caſe e indorſee or payee do not otherwiſe receive it; it is here lledged that the money is not paid, and it muſt be agreed hat ſuch an allegation is neceſſary in every declaration of his kind, and had it been omitted the defendant might have emurred. Every indorſor is chargeable, becauſe he is ſup- oſed to have received the value at the time of the indorſe- ent: the law implies that, if the indorſee had then aſked e indorſor, what if this bill be not paid by the drawee? the nſwer would have been, the drawer is a good man: but hat if the drawer ſhould fail? then I will pay you; this is ſtrongly implied as if it had been written in expreſs terms: e contract of the indorſor is diſtinct from that of the drawer, y implication of law and the cuſtom of merchants: he is as collateral ſecurity, that, if the acceptor or the drawer do t pay the money, he will: the greater the number of in- rſors, the better is the bill eſteemed, if before the day of yment, becauſe every name is an additional ſecurity, and e indorſee as frequently receives it on the credit of the in- rſor, as on that of the drawer or acceptor.

As it is neceſſary for the plaintiff to alledge the nonpay- nt of the money, in order to charge the defendant; ſo to charge himſelf, the latter muſt ſhew that it has been paid; r the nature of his undertaking is ſuch, that if the acceptor not pay it at the day, or afterwards ſatisfaction be made ſomebody, he will ſee it paid: but what is the defence up here? it amounts to no more than this; you have ſued e drawer, and recovered a judgment againſt him, and he has t paid you, therefore *I* will not pay you; the drawer was und to pay you as well as *I*, if the acceptor did not, there- e as he has not paid you, ſo neither will *I*: every indorſe- nt being a new bill, has two effects; it transfers to the orſee, the indorſor's right of action againſt the drawer and ceptor; and it creates an obligation on the indorſor, that the

the indorſee ſhall be ſatisfied: can a recovery then againſt the drawer without ſatisfaction diſcharge that engagement?

THIS caſe differs in two very material points from the caſe of treſpaſs: in treſpaſs the action may be brought joint againſt all the treſpaſſers, but here the undertakings of the drawer and indorſor are diſtinct, and a joint action cannot be brought againſt them both: again, trover and treſpaſs are founded on a wrong, and the damages are uncertain; and when they are reduced to a certainty by the verdict and judgment, they are changed into another nature from an action for a wrong to an action for a right, and the plaintiff cannot reſort back to any of the other parties to demand the uncertainty again: but this is an action founded on a right, and the recovery againſt one does not alter the nature of the claim againſt the other: the damages are certain, and the contract ſeveral; and there is an exact reſemblance between this caſe and that of two obligors in a bond: there judgment againſt one is not pleadable to an action againſt the other, nothing leſs than ſatisfaction will diſcharge the debt; becauſe the undertaking is ſeveral, each being bound for the payment.

THE ſame reaſon holds in this caſe; by the plaintiff's judgment againſt the drawer, the defendant's promiſe or contract is not changed, but his undertaking to ſee the debt paid ſtill continues.

AS to his having made his election, that doctrine does not apply here; this is not like the caſe of a man having two remedies to enforce the performance of one contract, as in the caſe of rent, where the landlord has two remedies, diſtinuity and diſtreſs, and after he has choſen to purſue one method, he is barred from the other: but here there are two different remedies on the ſame contract, but the ſame remedies on ſeveral diſtinct contracts; for the drawer, acceptor, and indorſor, are all chargeable on their ſeveral contracts: would this plea be good in the mouth of the acceptor? it cannot be pretended that it would, for his contract is of quite a different nature from that of the drawer; and that of the indorſor is as diſtinct as that.

THE great objection is, that we have inverted the courſe
proceeding, and deprived ſome of the parties of their reme-
s, if we ſhould be admitted to reſort back to the indorſor;
t it is conceived the caſe is otherwiſe; for the judgment
ainſt the drawer will not be pleadable againſt the defendant,
he ſue him after he has paid us; we have rather purſued
e right method, in ſuing the firſt obligor, the drawer, and
finding ſatisfaction from him, we reſort to the de-
dant.

NOTWITHSTANDING theſe arguments in favour of the
intiff, judgment was given for the defendant; but it was
rwards reverſed in the Exchequer chamber.

NEITHER is the engagement of an indorſor diſcharged by
ineffectual *execution* againſt the drawer or any prior or ſub-
quent indorſor.

A BILL was indorſed by Sheridan, and afterwards by
e Boon, and came into the hands of Hayling, who ſued
on, and took him in execution, and afterwards let him
t on a letter of licence without paying the debt. He then
d Sheridan, and held him to bail: Sheridan not paying the
, Hayling brought a third action againſt Mulhall, one of
bail, who inſiſted that the debt was ſatisfied by the im-
ſonment of Boon. But it was obſerved by the court,
t each indorſor is independent of the reſt, and that the bill-
lder had a right to ſue all the indorſors till the bill was ſa-
fied: the law indeed ſo highly regards the liberty of the
ject, that the taking of his body in execution, is, with re-
ct to him, a full ſatisfaction of the debt. But it only
erates as a diſcharge to the identical perſon ſo impriſoned;
does not diſcharge even his goods after his death, ſince the
tute of James the firſt. The remedy ſtill remains, after
death or diſcharge, againſt every other indorſor.

Hayling v. Mulhall. 2 Bl. Rep. 1235.

ON a Promiſſory Note, the engagement of the payee and
er indorſors is ſimilar to that of the drawer, payee, and
orſors of a Bill of Exchange, as far as that engagement can
ly, which is for payment only; the acceptance being
eady made by the bare iſſuing of the note.

THE

THE engagement of the drawer and indorſors is howe ſtill but conditional: in order to intitle himſelf to call up them in conſequence of it, the holder undertakes to perfo certain requiſites on his part, a failure in which precl him from his remedy againſt them.

WHERE the payment of a bill is limited at a certain t after ſight, it is evident the holder muſt preſent it for ceptance, otherwiſe the time of payment would never co it does not appear, however, that any preciſe time, wit which this preſentment muſt be made, has in any caſe b aſcertained: but it muſt be done as ſoon as, under all the cumſtances of the caſe, that can conveniently be done; all that has been ſaid on the preſentment of Bills and N payable on demand, ſeems exactly to apply here, that wh might be conſtrued as unneceſſary delay in the one c having evidently the ſame tendency to produce inconveni or loſs to the preceding parties in the other.

Vid. Mar. 12. WHETHER the holder of a bill, payable at a certain t after the date, be bound to preſent for acceptance im diately on the receipt of it, or whether he may wait til become due, and then preſent it for payment, is a queſ which ſeems never to have had a direct judicial determinat

Vid. 5 Bur. 2671. 1 Term. Rep. 713. in practice however it frequently happens that a bill is ne ciated and transferred through many hands without ceptance, and not preſented to the drawee till the tim payment, and no objection ever made on that account.

Mar. 12, 13. Beawes, 454. WHERE indeed a bill is remitted to a factor or agent procure acceptance, for the benefit of his principal, it is duty of the factor to uſe all diligence to have it accepted, to give advice to his principal of the event, that he may the proper ſteps in caſe of non-acceptance, and the fa may be liable to make good any loſs to his principal ari from his negligence; but this does not affect the bill it nor the right of the principal on it.

Bleſard and Hirſt. 5 Bur. 2670. Goodall v. Dolley. 1 Term. Rep. 712. IF, however, the holder in fact preſent the bill for ceptance, and that be refuſed, he is bound to give reg notice to all the preceding parties to whom he intends to ſort for non-payment; to the drawer, that he may know

regulate his conduct with reſpect to the drawee, and make ſuch proviſion for the payment of the bill; and to the indorſors, that they may ſeverally have their remedy in time againſt the parties on whom they have a right to call: and if on account of his delay, any loſs accrue by the failure of any of the preceding parties, *he* muſt bear the loſs.

THUS, if in the mean time the drawer fail, the holder cannot call on the payee indorſor, becauſe *he* can have no remedy againſt the drawer. Bleſard v. Hirſt. 5 Bur. 2670.

So, alſo, if the drawee fail, the holder cannot recover againſt either the drawer or indorſer, becauſe if he could, a loſs muſt fall on one of them, as the drawer can have no remedy againſt the drawee. Goodall v. Dolley. 1 Term. Rep. 712.

NOR will it make any difference, though the indorſor, from ignorance of the law, thinking himſelf bound to make good the money, promiſe afterwards to take up the bill at ſome future time. 5 Bur. 2670.

MUCH leſs can the indorſor be bound by a propoſal to diſcharge the bill by inſtalments, made after the return of the bill for non-payment, under an ignorance of acceptance being refuſed; more eſpecially if that propoſal be rejected by the indorſee. 1 Term. Rep. 712.

IF an acceptance varying from the tenor of the bill be offered by the drawee, the holder acquieſcing muſt ſend the ſame notice to the preceding parties, as if acceptance were refuſed, otherwiſe he cannot have recourſe to them; for to admit of ſuch acceptance without notice, is to give credit to the acceptor. Mar. 17.

IT is alſo the duty of the holder of a bill, whether accepted or not, to preſent it for payment within a limited time; for otherwiſe the law will imply that payment has been had, and it would be prejudicial to commerce if a bill might riſe up to charge the drawer at any diſtance of time, when all accounts might be adjuſted between him and the drawee. But ſo little has it underſtood at the beginning of this century, within what time payment was to be demanded, that caſes are reported of actions brought againſt the drawer ſeveral years after the bills were due, and without demand from the drawee, Allen v. Dockwra. 1 Salk. 127. Darrack v. Savage. 1 Show. 155.

There

There is alſo a difference in the terms in which the time f
preſentment is preſcribed by the judges: in one caſe it
ſaid, that with reſpect to foreign bills, the drawee has thr
days to pay them, and no demand needs be made till t
expiration of the three days, and if within that time he fa
the indorſor is chargeable, and after the *expiration* of t
three days, the indorſee may take the ſteps neceſſary to inti
him to his remedy againſt the preceding parties: but in a
other place it is laid down that the time of payment is t
laſt of the three days, and on that the money muſt be d
manded; and if the laſt be Sunday or a great holiday, the d
mand muſt be made on the ſecond. The laſt is the ru
adopted now.

Hill v. Lewis at N. P. 1 Salk. 132, 133.

Taffel v. Lewis. 1 Ld. Raym. 743.

Coleman v. Sayer. 2 Str. 829. Vid. Beawes, 461.

WHETHER the three days of grace ought by law to be a
lowed on a Promiſſory Note does not ſeem to have be
hitherto judicially determined, though in practice it be uſual
done. In one caſe Mr. Juſtice Denniſon is ſaid to ha
ruled that they were not to be allowed, but that caſe is me
tioned with a quere. In another, where the queſtion w
whether the action was not commenced before the cauſe
action accrued, Mr. Juſtice Buller is reported to have ſa
that he doubted whether the allowance was to be made; b
as it appeared that independently of the three days, the acti
had been commenced too ſoon, the point was not genera
conſidered. In a ſubſequent caſe, this point was incidenta
mentioned. That was an action on the ſtatute of uſury,
which the plaintiff declared on a contract to forbear for ſo
calendar months and three days. The evidence was a P
miſſory Note payable at four months from the date, an
was objected for the defendant that this was a variance. B
Lord Mansfield obſerving that in a computation of inter
made by the defendant himſelf, and which was in eviden
the three days of grace were allowed, he thought this de
ſive againſt him, without determining the general queſtion

Deflaux v. Hood, at Guildhall. Bul. N. P. 274.

Ward v. Honeywood. Doug. 61, 63.

Lloyd v. Skutt. M. 20 G. III. Doug. 63, in the notes.

ON principle, there ſeems little reaſon why the three d
of grace ſhould not be allowed. They were originally
lowed on Bills of Exchange by cuſtom eſtabliſhed by
univerſal conſent of merchants. The ſtatute of Queen A
wh

which was made to put Promiſſory Notes on the ſame footing with Bills of Exchange, does not certainly in expreſs terms ſay that, in this reſpect, they ſhall be conſidered in the ſame right, for then there could be no doubt; but it renders them negociable in the *ſame* manner, and gives the *ſame* remedy to the poſſeſſor: and it is fair to preſume it was intended, that as far as the nature of them admitted a compariſon with Bills of Exchange, they ſhould have the ſame incidents. The general practice ever ſince the ſtatute has been to make the allowance; every man who makes a Promiſſory Note does it under the conviction that he is not to be called upon for payment till the third day, or, if that be Sunday or a great holiday, till the ſecond: he who takes the note, and every other poſſeſſor, reſpectively purchaſes it under the opinion that they have no right to call on the drawer till that time.

PERHAPS the real reaſon why the point has not been judicially determined, is that no mercantile man ever entertained the idea that he had any right to diſpute it: and it does not appear to be venturing too much, to ſay that he who ſhall allow the days of grace on a Promiſſory Note in the ſame manner as on a Bill of Exchange, is in no danger of having neglect imputed to him, or, on that account only, to be debarred of his remedy againſt the collateral undertakers in default of payment by the drawer.

A PRESENTMENT either for payment or acceptance muſt be made at ſeaſonable hours: and ſeaſonable hours are the common hours of buſineſs in the place where the party lives with whom the preſentment is to be made.

If acceptance or payment be refuſed, or the drawee of the note or maker of the note has become inſolvent, or has abſconded, the holder muſt give notice to the preceding parties; and in that notice it is not enough to ſay that the drawee or maker refuſes, is inſolvent, or has abſconded, but it muſt be added, that the holder does not intend to give further credit. The purpoſe of giving notice is not merely that the indorſor ſhould know that default has been made, for he is chargeable only in a ſecondary degree; but to render him liable, it muſt be ſhewn that the holder looked to him for payment,

As to Bills, vid. 1 Str. 441, 515. Daggliſh v. Weatherby. 2 Bl. Rep. 747. As to Notes, vid. 1 Str. 649. 2 Str. 1087. Tindal v. Brown. 1 Term. Rep. 170.

payment, and gave him notice that he did ſo. A caſe might eaſily be imagined, where the indorſor might have notice from the holder, and yet would not be liable; as if the notice contained circumſtances which ſhewed that the indorſee had given time and credit to the acceptor or maker.

IT is therefore neceſſary that notice ſhould come from the indorſee himſelf: it is not ſufficient that the indorſor ſhould be informed by ſome third perſon, as by the drawee or maker that he does not chooſe to accept, or cannot pay.

WHAT ſhould be conſidered as a reaſonable time within which notice ſhould be given either of non-acceptance or non-payment, has been ſubject to much doubt and uncertainty: it was once held that a fortnight was a reaſonable time, but that is now much narrowed.

M. 21. C II. per Twiſden. 1 Mod. 27.

WITH reſpect to acceptance, it is uſual to leave a bill for that purpoſe with the drawee till the next day, and that is not conſidered as giving him time; it being underſtood to be the uſual practice: but if, on being called on the next day, he delay or refuſe to accept according to the tenor of the bill, the rule now eſtabliſhed, where the parties, to whom notice is to be given, reſide at a different place from the holder and drawee, is, that notice muſt be ſent by the next poſt. Under the ſame circumſtances, the ſame rule obtains in the caſe of non-payment.

Mar. 16.

1 Term. Rep. 169.

So, alſo, in caſe the drawee or maker has abſconded, or cannot be found, notice of theſe circumſtances, either in caſe of non-acceptance or non-payment, muſt be ſent by the firſt poſt.

BUT the great difficulty has been to eſtabliſh any general rule, where the party intitled to notice reſides in the ſame place, or at a place at a ſmall diſtance from that in which the holder lives. On this point, as well as on the queſtion, what ſhall be conſidered as a reaſonable time for making the *demand* of payment, it has been an object of no little controverſy, whether it was the province of the jury, or of the judge, to decide: till lately, it ſeems the jury had been permitted to determine on the particular circumſtances of each individual

Vid. the caſes at the end of Cap. III. and Doug. 515, 681.

ſividual caſe what time was reaſonably to be allowed, either for making demand or giving notice.

Metcalfe v. Hall. B. R. T. 22 G. III. cited Doug. 515 & 1 Term. Rep. 171. Appleton v. Sweetapple. B. R. M. 23 G. III. cited Doug. 515.

But it having been found that this was productive of endleſs uncertainty and inconvenience, the court on ſeveral occaſions have laid it down as a principle, that what ſhall be conſidered as a reaſonable time in either caſe is a queſtion of law: juries have however ſtruggled ſo hard to maintain their privilege in this reſpect, that in two caſes they have narrowed the time for demand, contrary to the opinion of the court; and on a ſecond trial being granted, have in both caſes adhered to their opinion, contrary to the direction of the judge. In one of them, however, an application being made for a third trial, the court would have granted it, had not the plaintiff precluded himſelf by proving his debt under a commiſſion of bankrupt which had iſſued againſt the drawees of the bill between the time of the verdict and the application.

1 Term. Rep. 169. Tindal v. Brown. 1 Term. Rep. 167.

In a third caſe, where the ſtruggle by the jury was to give longer time for notice than was neceſſary, the court adhered to their principle, and granted no leſs than three trials.

This caſe was an action by the indorſees of a Promiſſory note againſt the indorſor. The circumſtances were theſe: On the 21ſt of Auguſt, 1784, the note in queſtion was made by one Donaldſon for 35l. payable ſix weeks after date; on the 6th of October, 1784, the day on which the note became due, allowing for the three days of grace, Howell, the plaintiff's clerk, called at Donaldſon's at ten in the morning, and, not finding him at home, he left word that the note was due, and deſired Donaldſon would ſend for it at his maſter's, where it lay, and take it up; on the next day, the ſixth of October, he called again at Donaldſon's, who told him he would take it up that day within the banking hours, which were from nine to four o'clock; the note not being taken up that day, he called again on Donaldſon on the ſeventh, and not finding him at home, he was ſent to the defendant to tender the note, who refuſed to pay it, ſaying the plaintiffs had made it their own. Donaldſon proved at the trial, that immediately on his parting with Howell on the ſixth, he went to the defendant's houſe, and, not finding him at home, left a meſſage with his

wise that the note was due; that he, Donaldson, could not pay it, but that if the defendant would take it up, he would make it good to him.

It appeared that all the parties lived at Bristol within twenty minutes walk of each other.

On the first trial the jury gave a verdict for the plaintiff. On an application for a new trial, the court held that the bill had been dishonoured on the fifth, and that notice to the indorsor should have been given the same day; that by not giving it then, the holder had given credit to the maker and discharged the indorsor, and therefore they granted a new trial, on the ground that the jury had taken upon them to decide on a matter of law: on the second trial the jury gave a similar verdict, and a third trial was granted. It seems therefore fully established, that what shall be reasonable time is a question of law: but it seems almost impossible to fix any other rule than this, that demand must be made, and notice given as soon as, under all the circumstances, it is possible so to do.

1 Term. Rep. 410.

The reason why the law requires notice is, that it is presumed that the bill is drawn on account of the drawee having effects of the drawer in his hands; and that if the latter has notice that the bill is not accepted, or not paid, he may withdraw them immediately. But if he have no effects in the other's hands, then he cannot be injured for want of notice, and if it be proved on the part of the plaintiff, that from the time the bill was drawn, till the time it became due the drawee never had any effects of the drawer in his hands, notice to the latter is not necessary in order to charge him, for he must know whether he had effects in the hands of the drawer or not: and if he had none, he had no right to draw upon him and to expect payment from him; nor can he be injured by the non-payment of the bill, or the want of notice, that it has been dishonoured.

Bickerdike v. Bollman. 1 Term. Rep. 405.

A question arising on the validity of a commission of bankrupt on account of the insufficiency of the debt due to the petitioning creditor, the facts appeared to be these: the bankrupt being indebted to the petitioning creditor

tors in the ſum of 115l. 3s. 8d. On the 15th of September, 784, drew a bill for 20l. on the defendant, "who, till the me of the bankruptcy and of the bill becoming due, was a reditor of the bankrupt," payable to the petitioning credi-ors, two months after date, and paid it to them on account part of their debt: the bill was preſented for payment on e 18th of November following, and diſhonoured. No notice owever was ever given by the petitioning creditors to the ankrupt, or left at his houſe; a commiſſion iſſued againſt the rawer on the 20th of November, on which he was declared a ankrupt in the afternoon of the 24th; that commiſſion was terwards ſuperſeded, and another commiſſion was iſſued on e petition of the parties on the amount of whoſe debt the eſent queſtion aroſe. If the petitioning creditors, by not ving notice to the bankrupt of his bill being diſhonoured, d made the bill their own, their debt was reduced within ol. and then the commiſſion could not be ſupported; but notice was not neceſſary, the bill was not payment; their bt remained as it originally was, and the commiſſion was lid. On the principles before ſtated, the court held that tice in this caſe was not neceſſary, and therefore the com-ſſion was good.

YET though it appear that the drawer had no effects in hands of the drawee, no action can be maintained againſt *indorſor* if no notice was given him of the bill being onoured; for though the drawer may have received no ury, the indorſor, who muſt be preſumed to have paid a uable conſideration for the bill, probably has. 1 Term. Rep. 714.

THOUGH in the caſe where the drawer has effects in the ds of the drawee, the want of notice cannot be waved by bſequent promiſe by him to diſcharge the bill; yet where had no effects, it may; though it appear that in fact he ained an injury for want of ſuch notice: ſuch a ſubſe-nt promiſe is an acknowledgment that he had no right raw on the drawee, and if he has in fact ſuſtained damage his own fault. Rogers v. Stephens, 2 Term. Rep. 713.

BUT where damage in ſuch a caſe has been ſuſtained, and

no ſubſequent promiſe appears, it may be very doubtful whether want of notice can be waved.

Rogers v. Stephens. 2 Term. Rep. 714.

STEPHENS, reſiding at Newfoundland, drew a bill in favour of Rogers on Birbeck and Blake in London, value received for the uſe of William Calvert at Liverpool; Rogers preſented the bill for acceptance, which was refuſed, and afterwards for payment, which was alſo refuſed; but he ſent no notice to the drawer of the refuſal to accept: he afterwards brought an action againſt Stephens as the drawer, at the trial of which, the defence ſet up was the want of notice of non-acceptance, which was rebutted by ſhewing that the drawee never had any effects of the drawer in his hands, and by a ſubſequent promiſe appearing of the drawer to the plaintiff's agent; on which account a verdict, by the direction of

Lord Kenyon.

the judge, was given for the plaintiff.

ON an application for a new trial, the defendant's counſel ſtated, that, in addition to the above circumſtances, they had evidence to ſhew that the defendant really had been injured for want of notice; that they thought ſuch evidence had been offered and refuſed, and that his lordſhip had given his opinion on an admiſſion of its truth: but his lordſhip ſaid he had no note or recollection of any evidence of that kind having been tendered. The circumſtances were theſe: the defendant and Calvert had had dealings together previous to the departure of the former for Newfoundland, and he had a right to draw on Calvert at the time when the bill was drawn, having advanced money on his account to the amount of the bill. Under theſe circumſtances Calvert had directed the defendant to draw on Birbeck and Blake as his agents, inſtead of drawing on him. The defendant accordingly drew the bill, on the ſuppoſition that Calvert really had effects in their hands to anſwer it. It turned out however that he had none, but this was not known to the defendant; who, on his return to England, relying on his bill having been duly honoured, as he had no notice to the contrary, had ſettled his accounts with Calvert, and had delivered up to him goods and effects which he held in his hands of greater value than the amount of the bill; and that Calvert had ſince become inſolvent.

REASON

Reasoning on theſe facts, the counſel for the defendant contended that the principle, on which it had been held that no notice was neceſſary to be given to the drawer of the non-acceptance of his bill when he had no effects in the hands of the drawee, was deciſive that it ought to have been given in the preſent caſe. Beſide the preſumption of fraud againſt a man who draws a bill, on another who, he knows, has no effects to anſwer it, one of the principal grounds aſſigned by the court for their opinion was, that no injury could ariſe to the drawer for want of notice. That reaſon therefore could not apply, where the drawer acted fairly, and had actually ſuſtained an injury for want of notice. That caſe too is an exception to the general rule; nothing is better eſtabliſhed than that the holder of a Bill of Exchange of which acceptance is refuſed, is in general bound to give notice of ſuch refuſal to the drawer; if from any collateral circumſtances he chuſe upon himſelf to withhold it, he acts at his peril. If it appear that the drawer could receive no injury from the want of it, he is indemnified by the event; but ſtill he is guilty of neglect, the conſequences of which to him, are only avoided by that circumſtance. The very form of this bill was ſufficient notice to the holder that it was to be paid out of Calvert's effects; for it is ſaid to be for his uſe. So that there was more reaſon than uſual to imagine that want of notice might be prejudicial to the defendant. Conſidering the queſtion even in a general point of view, it would be highly detrimental to commerce, if it were to be laid down as a general rule without exception, that the objection ariſing from want of notice in theſe caſes might be done away by ſhewing that the drawee had no effects of the drawer in his hands at the time. Nothing is more common than for merchants abroad, who are about to ſhip goods to their conſignees or factors in England, to draw Bills of Exchange on them, before the goods come into their hands; in which caſe, the moſt material injury might ariſe to thoſe traders from want of notice that the bills had not been accepted, ſince they might be deprived by that mean of the opportunity of ſtopping their goods in their way.

To this it was anſwered, that admitting the full force of the evidence before ſtated, it could not vary this caſe; for that as between theſe parties, it was not neceſſary for the holder of a bill to look to any other perſons than thoſe who are liable on the face of the bill itſelf. He cannot enter into the particular grounds which induce the drawer to draw the bill, or the drawee to refuſe his acceptance; it would lead to endleſs uncertainty if he were bound to do ſo. If one man chooſe to draw a bill, having no funds of his own in the hands of the drawee, but relying on the caſualty of the ſtock of another who has miſled him, he has his remedy againſt the perſon, but that makes no alteration in the law relative to the holder of ſuch a bill. The rule of law is clear, and operates with a double aſpect in this caſe; for ſuppoſing the plaintiff was bound to take notice that this was in reality the bill of Calvert, and not of the defendant Stephens, which it purports to be, ſtill the rule would apply againſt the latter, for it appears that Calvert himſelf had no effects in the hands of the drawees.

So much of this reaſoning, however, as applies to the particular caſe appears fallacious, for the real queſtion was not whether Calvert himſelf could have drawn on the preſent drawees, but whether the defendant having a clear right to draw on Calvert, and being directed by him to draw on his agents, not knowing that they had no effects of Calvert's was entitled to notice from the holder of his bill being dishonoured.

But on this occaſion, the court did not think proper to decide on the general queſtion, firſt becauſe the circumſtances here mentioned did not appear to have been offered in evidence at the trial; and ſecondly, becauſe if they were, whatever might have been the effect of them in favour of the defendant, he had precluded himſelf from taking advantage of it, by his ſubſequent promiſe to diſcharge the bill.

In the manner in which notice either of non-acceptance or non-payment is given, there is a remarkable difference between inland and foreign bills: in the former, no particular form of words is neceſſary, to intitle the holder to re-

1 Term. Rep. 170.

gainſt the drawer or indorſors, the amount of the bill on failure of the drawee or acceptor; it is ſufficient if it appear that the holder means to give no credit to the latter, but to hold the former to their reſponſibility.

But in foreign bills other formalities are required: if the perſon to whom the bill is addreſſed, on preſentment will not accept it, the holder is to carry it to a perſon veſted with a public character, who is to go to the drawee and demand acceptance in the ſame manner as before, and if he then refuſe, the officer is there to make a minute on the bill itſelf conſiſting of his initials, the month, the day, and the year, with his charges for minuting. He muſt afterwards draw up a ſolemn declaration, that the bill has been preſented for acceptance which was refuſed, and that the holder intends to recover all damages which he, or the deliverer of the money to the drawer, or any other may ſuſtain on account of the non-acceptance; the minute is in common language termed the noting of the bill, the ſolemn declaration, the proteſt, and the perſon whoſe office it is to do theſe acts a public notary: and to his proteſtation all foreign courts give credit.

Mal. 264. Mar. 16.

This proteſt muſt be made within the regular hours of buſineſs, and in ſufficient time to have it ſent to the holder's correſpondent by the very next poſt after acceptance refuſed; for if it be not ſent by that time, with a letter of advice, the holder will be conſtrued to have diſcharged the drawer and the other parties intitled to notice: and noting alone is not ſufficient; there muſt abſolutely be a proteſt to render the preceding parties liable.

Geoffrey v. Mead. Bul. N. P. 272. 2 Term. Rep. 713.

But in this caſe the holder is not to ſend the bill itſelf to his correſpondent; he muſt retain it, in order to demand payment of the drawee when it becomes due.

When the bill becomes due, whether it was accepted or not, it is again to be preſented for payment within the days of grace, and if payment be refuſed, it muſt be preſented for non-payment, and the bill itſelf, together with the proteſt, ſent to the holder's correſpondent, unleſs he ſhall be ordered by him to retain the bill, with a proſpect of obtaining its diſcharge from the acceptor.

Beawes, 466.

Beawes, 462.

FOR no drawer or indorſor is bound to make reſtitutio on ſight of the proteſt alone; nor, where one of the ſet h been accepted, on ſight of the proteſt and unaccepted bil but he muſt give ſatisfactory ſecurity to the remitter on h producing the proteſt only, to make payment when that a the accepted bill ſhall be preſented.

Mal. 265.

WHERE the drawee cannot be found at the place me tioned in the bill, or has abſconded, proteſt is to be made f non-acceptance in the ſame manner as if acceptance had be refuſed on preſentment.

Mar. 17, 18.

So alſo, if the drawee offer an acceptance differing fro the tenor of the bill, and the holder be inclined to admit without giving up his claim on the other parties, he mu proteſt it for that cauſe; as if the drawee offer an acce tan for part, the holder may permit him to accept in that wa but he muſt cauſe it to be proteſted for non-acceptance the whole, and ſend the proteſt to his correſpondent, that may endeavour to procure ſecurity for the remaining ſu When the bill becomes due, the holder muſt preſent it payment, and may receive the ſum for which it was cepted, and write a receipt for ſo much on the bill; but muſt proteſt it for non-payment of the reſt, and ſend b the proteſt with the bill.

BESIDE the proteſt for non-acceptance, and non-pa ment, there may alſo be a proteſt for better ſecurity; thi uſual, when a merchant, who has accepted a bill, happens become inſolvent, or is publicly reported to have failed in credit, or abſents himſelf from change before the bill he accepted has become due, or when the holder has any reaſo

Mar. 87. 1 Lord Raym. 743.

ſuppoſe, it will not be paid: in ſuch caſes he may cau notary to demand better ſecurity, and on that being refu make proteſt for want of it; which proteſt muſt, as in ot caſes, be ſent away by the next poſt, that the remitter drawer may take the proper means to procure better curity.

WHERE the original bill is loſt, and another cannot be of the drawer, a proteſt may be made on a copy, eſpeci wh

where the refuſal of payment is not for want of the original bill, but merely for another cauſe.

A. drew a firſt and ſecond Bill of Exchange payable by himſelf in Dublin to B. or order, for value received of him. B. after the bill was due, negociated it with the plaintiff. The plaintiff on the ſame day indorſed it to D. living in Dublin in theſe words, Pay to D. value on my account. The firſt of theſe bills was at the ſame time ſent away to D. and was loſt on the way, and the drawer being gone to Ireland, no third bill could be had, and leſt the ſecond ſhould miſcarry as well as the firſt, an exact copy of the ſecond bill was ſent to D. and demand of payment being made, it was refuſed, becauſe the money had been attached in the hands of the party who was to pay the bill; the proteſt was made on the copy, and at the trial the original ſecond bill, along with the proteſt on the copy, was produced and held good. Dehers v. Harriott, 1 Show. 164.

THE effect of proteſt for non-acceptance or non-payment is to charge the drawer or indorſors not only with the payment of the principal ſum, but with damages, intereſt, and coſts; but where the bill is accepted, it is ſo far from diſcharging the acceptor, that it renders him liable to refund every loſs ſuſtained by his non-payment. Here however it muſt be obſerved that the coſts mentioned to be given by the proteſt, are not coſts of ſuit, but other expences incurred: coſts of ſuit, where the ſuit may be without proteſt, are of courſe given. Mar. 23, 24.

BESIDE the intereſt and coſts, the damages, incurred by non-acceptance or non-payment, conſiſt uſually of the exchange, re-exchange, proviſion, and poſtage, together with the expences of proteſt. The exchange is reckoned according to the courſe at ſight, at that time and place where the proteſt is made, to the place where the payment ſhould be made by the drawer; but if payment be not made there, then the ſum is again increaſed, by the addition of commiſſion and poſtage; and the courſe of exchange is now reckoned on the whole ſum, according as it obtains at that time and place, on ſight to the place where the bill is paid; and the acceptor muſt pay the re-exchange and all charges, although Beawes, 401.

although the parcel was not effectually negociated and re-drawn, that is, re-exchange, proviſion, and poſtage must be twice paid, &c. as proviſion twice for the exchange and re-exchange; the charges being only for poſtage and protests, unleſs the acceptor, by delays and excuſes, force the holder on ſome neceſſary charges to recover, which the acceptor is obliged to pay; but no extraordinary ones, ſuch as travelling, will be allowed. And if the acceptor under the before mentioned circumſtances refuſe immediate payment to the returned bill, a legal intereſt may be charged him from the day the bill was due, to the time of its diſcharge; though he ſhall not be obliged to make good any other loſs or damage, which the poſſeſſor may pretend he has ſuſtained from want of punctual payment, by being fruſtrated in his deſigns of entering into ſome beneficial engagement, or the loſs of a convenient opportunity of advantageouſly employing the ſum detained.

Str. 649.

Beawes, 461.

WHEREVER intereſt is allowed, and a new action cannot be brought for it, which is the caſe on Bills of Exchange and Promiſſory Notes, the intereſt is to be calculated up to the time of ſigning final judgment.

2 Bur. 1086. 1087.

WHERE a bill indorſed over is not duly paid, the indorſee may charge the indorſor with intereſt, exchange, and other incidental expences, beyond the amount of 5 per cent. if ſuch charges be reaſonable, warranted by uſage, and not made a colour for uſury: thus the conſtant courſe has been with reſpect to bills returned, proteſted, from India, to allow 10s. per pagoda, which includes intereſt, exchange, and all other charges; and this notwithſtanding the current price of exchange at which the bill was diſcounted, may have been greatly below 10s. as at 6s. 6d: and the indorſee will alſo be intitled to intereſt at 5 per cent. from a reaſonable time after notice given to the indorſor of the bill having been returned unpaid.

Auriol v. Thomas. 2 Term. Rep. 52.

THE principal difference between foreign and inland Bills of Exchange at common law, ſeems to have been this. A proteſt for non-acceptance or non-payment of a foreign bill was, as it ſtill is, eſſentially neceſſary to charge the drawer

on the default of the drawee; nothing, not even the principal ſum, could, or can at this time be recovered againſt him without a proteſt: no other form of notice having been admitted by the cuſtom of merchants as ſufficient: but inland bills having been introduced at a late period, in imitation of foreign ones, did not immediately adopt all their incidents: ſimple notice, within a reaſonable time of the default of the drawee, was held ſufficient to charge the drawer; but it does not appear that in any inſtance they were favoured with the ſolemnity of a proteſt: the diſadvantage ariſing from thence was this, that notice entitled the holder to recover only the ſum in the original bill, which in many caſes might be a very ſerious diſadvantage: to remedy this inconvenience in ſome degree, it was enacted "that after the twentieth of June, 9 & 10 W. III. c. 17.
"1698, all and every Bill or Bills of Exchange drawn in, or "dated at and from, any trading city or town, or any other "place in the kingdom of England, dominion of Wales, or "town of Berwick upon Tweed, of the ſum of 5l. ſterling or "upwards, on any perſon or perſons of, or in London, or "any other trading city, town, or any other place, *in which "ſaid Bill or Bills of Exchange ſhall be expreſſed the ſaid "value to be received*, and is and ſhall be drawn payable, at "a certain number of days, weeks, or months, after *date* "thereof, that from and after preſentation and acceptance of "the ſaid Bill or Bills of Exchange, *which acceptance ſhall be "by underwriting the ſame under the party's hand ſo accepting*, "and *after* the *expiration* of three days after the ſaid bill or "bills ſhall become due, the party to whom the ſaid bill or "bills are made payable, his ſervant, agent or aſſigns, may "and ſhall cauſe the ſaid bill or bills to be proteſted by a no-"tary public, and in default of ſuch notary public, by any "other ſubſtantial perſon of the city, town, or place, in the "preſence of two or more credible witneſſes, refuſal or neg-"lect being firſt made of due payment of the ſame: which "proteſt ſhall be made and written under a fair written "copy of the ſaid Bill of Exchange, in the words or form "following:

Know

Know all men, that I A. B. on the day of
at the uſual place of abode of the ſaid
have demanded payment of the bill of which the
above is a copy, which the ſaid did not
pay, wherefore I the ſaid do hereby
proteſt the ſaid bill. Dated this day of

" WHICH proteſt ſo made, ſhall within *fourteen* days after
" the making thereof, be ſent; or *otherwiſe* due notice ſhall
" be given, to the party *from whom* the ſaid bill or bills were
" *received*, who is, on producing ſuch proteſt, to repay the
" ſaid bill or bills, together with all intereſt and charges, from
" the day ſuch bill or bills were proteſted; for which proteſt
" ſhall be paid a ſum not exceeding the ſum of ſixpence; and
" in default or neglect of ſuch proteſt made and ſent, or due
" notice given within the days before limited, *the perſon ſo*
" *failing or neglecting thereof, is and ſhall be liable to all coſts,*
" *damages, and intereſt, which do and ſhall accrue thereby.*"

Harris v. Benſon. 2 Str. 910.

IN an action againſt the drawer of an inland bill after an acceptance, no intereſt will be allowed on this ſtatute, without a proteſt.

BUT this ſtatute only giving the proteſt in caſes where the acceptance was by writing on the bill, perſons on whom bills were drawn, knowing that ultimately the damages ariſing on the proteſt for non payment, muſt fall on themſelves, refuſed to accept in that form, and would give only a verbal promiſe, which rendered the proviſions of the act perfectly nugatory: in order to remedy this inconvenience,

3 & 4 Ann, c. 9.

was enacted by a ſubſequent ſtatute, " that from and after
" the firſt of May, 1705, in caſe, upon preſenting any ſuch
" Bill or Bills of Exchange, the party or parties, on whom
" the ſame ſhall be drawn, ſhall refuſe to accept the ſame by
" underwriting the ſame, as aforeſaid, the party to whom the
" ſaid bill or bills are made payable, his ſervant, agent, or
" aſſigns, may and ſhall cauſe the ſaid bill or bills to be pro-
" teſted for non-acceptance, as in caſe of foreign Bills of
" Exchange, any thing in the former act, or any other law
"

to the contrary notwithſtanding: for which proteſt there ſhall be paid two ſhillings and no more."

"PROVIDED that the proteſt hereby required for non-acceptance, ſhall be made by ſuch perſons as are appointed by the former act to proteſt inland Bills of Exchange for non-payment." S. 6.

"PROVIDED always, that no acceptance of any ſuch inland Bill of Exchange ſhall be ſufficient to charge any perſon *whatſoever*, unleſs the ſame be underwritten or indorſed in writing thereupon: and if ſuch bill be not accepted by ſuch underwriting or indorſement in writing, no *drawer* of any ſuch inland bill ſhall be liable to pay any coſts, damages, or intereſt thereupon, unleſs ſuch proteſt be made for non-acceptance thereof, and within *fourteen* days after ſuch proteſt, the ſame be ſent, or otherwiſe notice thereof be given to the party from whom ſuch bill *was received*, or left in writing at the place of his or her uſual abode; and if ſuch bill be accepted and not paid *before* the *expiration* of three days after the ſaid bill ſhall become due and payable, then no *drawer* of ſuch bill ſhall be compellable to pay any coſts, damages or intereſt thereupon, unleſs a proteſt be made and ſent in manner and form above mentioned: nevertheleſs, every drawer of ſuch bill ſhall be liable to make payment of coſts, damages and intereſt upon ſuch inland bill, *if any one proteſt be made of non-acceptance or non-payment thereof, and notice thereof be ſent, given or left, as aforeſaid.*" S. 5.

"PROVIDED, that no ſuch proteſt ſhall be neceſſary, either for non acceptance or non-payment, *unleſs the value be acknowledged and expreſſed in ſuch bill to be received, and unleſs ſuch bill be drawn for the payment of twenty pounds ſterling or upwards.*" S. 6.

"PROVIDED that nothing herein contained ſhall extend to diſcharge any remedy, that any perſon may have againſt the drawer, acceptor, or indorſor of ſuch bill." S. 8.

THESE acts are in many reſpects obſcure, and the comments on them in many of the early reporters equally ſo.

It

6 Mod. 80, 81. 1 Salk. 131. 3 Salk. 69. Brough v. Perkins. 2 Ld. Raym. 992.

It was ſoon diſcovered, that from the general wording of both, and the proviſion in the eighth ſection of the latter, notwithſtanding theſe ſtatutes, the holder might ſtill, by giving reaſonable notice without proteſt, recover againſt the acceptor, the drawer or indorſor, the amount of the original bill; and that a written acceptance was not neceſſary to charge the acceptor: for that the word *damages* in theſe acts does not mean the original ſum, that being recoverable before, but the loſs accruing from the delay: and that the clauſe

Vid. page 46.

Vid. page 46, 47, 48.

"which provides that no acceptance not expreſſed in writing "on the bill ſhould be ſufficient to charge any perſon what-"ever," relates only to the non-recovery of *theſe* damages without a proteſt for non-acceptance. So far is perfectly intelligible. The ſame thing cannot be ſaid of what follows: "If the drawer for want of proteſt or reaſonable notice "ſuffer any damage, that ſhall be born by him to whom the "bill is made, and if the damage amount to the whole ſum "mentioned in the bill, the payee ſhall not recover: the act "ſeems only to *take* from the plaintiff his *intereſt* and "*damages*, where he has *not* made a proteſt, or to give the "*drawer* a remedy againſt him by way of action for the "coſts and damages." This evidently is intended as an explanation of that part of the firſt ſtatute which provides, that "the perſon failing to proteſt is and ſhall be *liable* to all coſts "damages, and intereſt, which ſhall accrue thereby." But it is manifeſt this proviſion could never be meant to *take* from a plaintiff that to which he was *not before intitled:* neither can it be imagined that it was intended to give an action to the drawer on account of damages which he could not ſuſtain but by being made anſwerable for the loſs of another: to enable him to reſiſt the claim of that other, who had not entitled himſelf to recover, by neglecting to follow the direction of the act, was ſufficient to protect the drawer againſt all poſſible loſs. The clauſe is certainly inaccurate; the word *liable* is equivocal; but the meaning is manifeſtly this, that the perſon neglecting to proteſt, ſhall not be entitled to call on the drawer for his extraordinary damages, intereſt, and coſts, but muſt bear them himſelf.

The

THE profeſſed intention of theſe acts was to put inland ills of Exchange on the ſame footing with foreign ones; ſo r as relates to the recovery of damages, intereſt, and coſts, means of the proteſt, they have done it; but there are veral minute particulars in which, from an attentive peruſal the acts, it will appear they ſtill differ.

To the conſtitution of a Bill of Exchange, we have ſeen, Page 41
is not neceſſary that the words "value received" ſhould be ſerted, and the want of theſe in a foreign bill cannot deprive e holder of the benefit of a proteſt; but that benefit in ſe of non-payment is not given to inland bills which want eſe words; and therefore they cannot be proteſted for non-yment: and the ſecond act provides that "where theſe words are wanting, or the value is leſs than twenty pounds, no proteſt is *neceſſary* either for non-acceptance or non-payment." What may be the true meaning and opera-on of this proviſion is far from being clear: by the natural nſtruction of the words, it might be imagined the legiſla-re meant to give damages on bills of theſe deſcriptions, thout impoſing on the holder the *neceſſity* of proteſting: t that ſuppoſition is not conſiſtent with the general pur-w of the two acts, ſo that the ſafeſt conſtruction ſeems to that inland bills without the words "value received," or der twenty pounds, ſhall continue as at common law, and ll not be *intitled* to the privilege of a proteſt either for non-ceptance or non-payment.

IN foreign bills, there is no diſtinction between thoſe pay-e at ſuch a time after *date*, and after *ſight*; but the ſtatute nfines the benefit of proteſt on inland ones to thoſe payable er *date*; ſo that in *ſtrictneſs* there can be no proteſt on ſe payable after *ſight*.

IN foreign bills where the acceptance is in words only, in ſome collateral writing, a proteſt may be made for non-yment, as well as if the acceptance had been in writing on Vid. Mar. 17.
bill: but the ſtatute of William confines the proteſt for n-payment to thoſe bills on which the acceptance is itten; and therefore in order to have the benefit of a pro-for non-payment, where the acceptance is collateral, the

holder

holder muſt proteſt for non-acceptance; unleſs it be ſu
poſed that this clauſe is repealed, by that proviſion in t
ſtatute of Queen Ann, which ſays: "nevertheleſs, eve
"drawer of ſuch bill ſhall be liable to make payment
"coſts, damages and intereſt on ſuch inland bill, *if any*
"*proteſt be made of non-acceptance or non-payment, and no*
"*thereof, be ſent, given, or left as aforeſaid:*" which inde
ſeems to be the only conſtruction that can aſcribe any mea
ing to the clauſe: for if this be not the true conſtructio
then this proviſion can mean nothing more than that, whe
only acceptance is refuſed, but the money paid when du
there a proteſt for non-acceptance alone is ſufficient; a
that where the bill is accepted, but not duly paid, then
proteſt for non-payment is ſufficient: which would be
ſuppoſe that the legiſlature meant nothing at all.

If, indeed, this clauſe be not a repeal of the clauſe in t
former ſtatute, the general practice of merchants in the c
of London is unwarranted; for a proteſt is hardly ever ma
for non-acceptance of an inland bill; it is only noted f
non-acceptance, and if not paid when due, it is frequent
proteſted for non-payment: however, notice muſt be giv
of the non-acceptance and noting, otherwiſe, according
the caſes before cited, the holder takes the riſk upon himſelf

The preceding clauſes of the ſixth ſection of this ſtatute
Queen Ann creates indeed a difficulty in ſupporting this co
ſtruction of the latter clauſe; for if this be a repeal of t
clauſe in the ſtatute of King William, it is very difficult
ſay whether it may be conſidered as a repeal of thoſe al
and it would be too much to ſay that the legiſlature has ma
a proviſion in the former part of a ſingle ſection of an act
parliament, and in the latter part repealed it: the only wa
can ſee of ſolving this difficulty, is to take the whole ſecti
together, and to endeavour to give it one cumulative co
ſtruction, conſtruing the preceding clauſes in the alternati
and then it may be conſidered as running thus: "If ſu
bill be not accepted by underwriting or indorſement, wh
preſented for acceptance, and, when preſented for payme
be not paid; then if it be not proteſted either for non-
ceptan

ceptance or for non-payment, the drawer ſhall not be liable for damages, intereſt, and coſts."

If this be the true conſtruction of this clauſe, there appears to be another difference ſtill ſubſiſting between foreign and inland Bills of Exchange; for where acceptance and payment are both refuſed on foreign bills, it ſeems neceſſary that there ſhould be a proteſt for each; at leaſt it is decided that in ſuch a caſe, a proteſt for non-payment only is not ſufficient. Vid. ante page 87.

ANOTHER difference between foreign and inland bills with reſpect to the proteſt is, that the former muſt be preſented for payment *before* the expiration of the laſt day of grace, and in time to have the proteſt ſent off the ſame night, if the poſt then ſets out: but on inland bills the proteſt for non-payment may be *after* the expiration of the three days, and notice ſent within *fourteen* days after the proteſt.

IT is alſo remarkable that in inland bills, where damages, intereſt, and coſts are to be recovered, there is more indulgence in the time allowed for notice of non-payment, than where only the principal ſum is to be recovered; for when there is no proteſt for non-payment, preſentment for payment muſt be made ſo early on the laſt day of grace that the holder may give notice of non-payment by the next day. Vid. ante page 80.

THAT part of the ſtatute of Queen Ann, which puts promiſſory Notes on the ſame footing with inland Bills of Exchange, makes no expreſs proviſion of proteſting them, for non-payment; but there can be no doubt that the ſame privilege is impliedly conferred on them, and in practice a proteſt is frequently made. 3 & 4 Ann. c. 9. s. 1.

WHEN a bill is drawn for the account of a third perſon, and accepted according to its tenor for his account, and he fails without making proviſion for its payment, the acceptor muſt diſcharge the bill, and can have no redreſs againſt the drawer. Beawes, 456.

BUT if the drawee do not chooſe to accept on the account of him for whoſe account he is adviſed the bill is drawn, he may accept for the account and honour of the drawer. Id. ibid.

Or, if a bill made payable to order, be indorſed by a ſ
ſtantial man before acceptance be demanded; the drawee, i
have any doubt about the drawer, or of him on whoſe
count it is drawn, may accept it for the honour of the
Id. Ibid. dorſor; but in this caſe he muſt firſt have a formal proteſt m
for non-acceptance, and ſhould ſend it without delay to
indorſor for whoſe honour he has accepted it.

Id. 458. Such acceptances as theſe are called acceptances ſ
proteſt; and have this effect with reſpect to the ſecuri
the acceptor, that they give him a right to call on the p
for whoſe honour he accepts; and in the caſe of an accept
for the honour of the indorſor, on him and all the parties
fore him; whereas a ſimple acceptance, according to the
of the bill, gives him a remedy only againſt the drawe
againſt him on whoſe account the bill is drawn, as the
may be.

The method of accepting *ſupra* proteſt is this; the
ceptor muſt perſonally appear with witneſſes before a no
(whether the ſame who proteſted the bill or not, is of no
portance) and declare that he accepts ſuch proteſted b
honour of the drawer or indorſor, &c. and that he
ſatisfy the ſame at the appointed time; and then he
ſubſcribe the bill thus, "Accepted *ſupra* proteſt, in ho
of T. B. &c."

Id. 457. But this acceptance ſupra proteſt may be ſo worded
though it be intended for the honour of the drawer,
may equally bind the indorſor, and in ſuch a caſe it m
ſent to the latter.

Id. Ibid. If the perſon on whom the bill is drawn refuſe to
it, any *third* perſon after proteſt for non-acceptanc
accept *ſupra* proteſt for the honour of the bill or of the d
or of any particular indorſor: if he accept for the hon
the bill or of the drawer, he is bound to all the indor
well as to the holder: if in honour of a particular in
then to all ſubſequent indorſees.

Id. 457, 458. Any one accepting a bill *ſupra* proteſt, though with
orders or knowledge of the perſon for whoſe honour
cepted it, has a remedy againſt that perſon, who h

o satisfy him as if he had acted entirely by his directions, for
is commission, postage, and other charges.

If a bill be protested for non-acceptance, and after it has Id. 457.
een accepted *supra* protest by a third person, the drawee, on
eceiving fresh advice and orders, determine to accept and
ay it, the acceptor *supra* protest may permit him, though
e holder cannot be obliged to free him from his acceptance;
d if the two acceptors agree, the drawee must pay the
her his commission, charges, &c. as it was by his ac-
eptance that the bill was prevented from being returned
rotested.

If the acceptor of a bill for the honour of the drawer or Id. 458.
dorsor, receive his approbation of the acceptance, then he
ay safely pay the bill without any protest for non-payment.
ut if the person, for whose honour the bill was accepted,
ther return no answer to the advice, or express a disappro-
ation of the acceptance, then the acceptor *supra* protest
ust cause a formal protest to be drawn up for non-payment
gainst him to whom the bill was directed, and on his con-
uing to refuse payment, must then pay it for him.

When a bill is protested for non-payment, any man may Id. ibid.
y it under protest, for the drawer's or indorsor's honour,
en he who made or he who suffered the protest; but he
ust previously declare before a notary, for whose honour he
charges it; and of this the notary must give an account to
e parties concerned, either jointly with the protest, or in a
parate instrument.

He who discharges a bill protested for non-payment, in ho- Beawes,
ur of the drawer, has his remedy against the latter, but not 459.
ainst the indorsors; but he who discharges a bill protested
non-payment, in honour of an indorsor, has his remedy
only against that indorsor, but against all that were before
, including the drawer; but he has no right against sub-
uent indorsors.

A man, after having given a simple acceptance to a bill, can- Id. 458.
satisfy it under protest, in honour of an indorsor, because
cceptor, he has already bound himself to that indorsor;
a drawee, not having yet accepted the bill, may discharge

it for the honour of the indorſor or drawee, as if he were a third perſon unconcerned.

Id. ibid. YET it is ſaid that the poſſeſſor of a bill, proteſted for non-payment, is not bound to admit of its diſcharge from a third perſon under proteſt, either in honour of the drawee or of any indorſor, unleſs he declare and prove that the honour of that bill was particularly recommended to him: and if the proteſted bill be indorſed by the poſſeſſor's correſpondent and was remitted by him, then the poſſeſſor ought not to admit of any payment in honour of the indorſements, but under the expreſs condition, that the payer ſhall have no redreſs againſt the ſaid correſpondent.

WHAT is ſaid with reſpect to the *payment* of a bill *ſupra* proteſt is applicable to that of a Promiſſory Note.

Id. 455. THE effect of the acceptance is to give credit to the bill and to render the acceptor liable according to the tenor of his acceptance; the very act of accepting implies an acknowledgment that he has effects of the drawer in his hands.

Symonds v. Parminter. 1 Wilſ. 185. IF therefore the drawee accept a bill generally, and for reaſon of his non-payment, the drawer be obliged to pay it, the latter, as drawer, may maintain an action againſt him, not only for the principal ſum, but, in caſe of a proteſt, for damages, intereſt, and coſts.

IF indeed the drawee have no effects of the drawer in his hands, and notwithſtanding accept the bill, he has his remedy if he pay it, againſt the drawer; but with regard to every body beſides, the acceptor is conſidered as the original debtor, and to be entitled to have recourſe againſt him, it is Doug. 249. not neceſſary for the holder to ſhew notice given to him of non-payment by any other perſon.

Mar. 17. Beawes, 454. WHEN a bill is once accepted abſolutely, it cannot in any caſe be revoked, and the acceptor is at all events bound, though he hear of the drawer's having failed the next moment, even if the failure was before the acceptance.

BUT the acceptor may be diſcharged by an expreſs declaration of the holder, or by ſomething equivalent to ſuch declaration.

BL

BLACK held, as indorſee, a bill drawn by one Dallas, and accepted by Peele. Black arreſted Peele, but finding that no conſideration had been given for the acceptance, his attorney took a ſecurity from Dallas, and ſent word to Peele "that he had ſettled with Dallas, and he needed not to trouble himſelf any further." Dallas afterwards became bankrupt, and then Black demanded payment of Peele. The cauſe was tried firſt before Lord Mansfield, and afterwards by chief Juſtice de Grey, who both held that the acceptor was diſcharged. Black v. Peele, cited Doug. 237. (249.)

IN another caſe a book of the plaintiff's was produced in which the bill was entered, and over againſt it this memorandum, "Mr. Pulteney's acceptance annulled." The jury however gave a verdict for the plaintiff, but the Court of Exchequer granted a new trial, on the ground that this was an implied diſcharge; and on the ſecond trial before Chief Baron Skinner, one Alexander, who had indorſed the bill to the plaintiff, was produced as a witneſs on the part of the defendant, and ſwore that Walpole had poſitively agreed to conſider Pulteney's acceptance as at an end; on which the jury found for the defendant. Walpole had kept the bill from 1772 to 1775 without calling on Pulteney. Walpole v. Pulteney, cited Doug. 237. (249.)

BUT no circumſtances of indulgence ſhewn to the acceptor by the holder, nor an attempt by him to recover of the drawer, will amount to an expreſs declaration of diſcharge.

DUNSTER accepted a bill merely to lend his credit, and to accommodate Wheate, the drawer. Fitzgerald, the payee, indorſed it to Dingwall, and delivered it to him in payment for jewels. After it became due, the plaintiff, underſtanding that the acceptor never had any conſideration for it, and that Wheate was the real debtor, wrote to one Ready, Wheate's attorney, on the 6th of February, and on the 4th of November, 1775, preſſing him for the payment. Dunſter, on the 13th of February, 1775, wrote a letter to Dingwall, thanking him in ſtrong terms for not proceeding againſt *him*, but mentioning in the ſame letter that he had been informed by a perſon who had been ſent from him to Dingwall on the buſineſs, that Wheate had taken up the bill, Dingwall v. Dunſter. Doug. 235. (247.)

and given another to Dingwall's ſatisfaction. It did not appear that Dingwall took any notice of that letter. But he for ſome time received intereſt on the bill from Wheate, and alſo the principal due by another bill, made at the ſame time, and drawn and accepted by the ſame parties, and under like circumſtances. The plaintiff ſuffered ſeveral years to elapſe without calling on Dunſter, or treating him as his debtor.

THE Queſtion was, whether the plaintiff, by his conduct had diſcharged the acceptor; and the court unanimouſly held that he had done nothing from which it could be concluded he meant to abandon his claim againſt him. He had done right in applying to Wheate for payment, as he was apprized that he was in fact the debtor, and Dunſter was ſo far ſenſible of his kindneſs, as to thank him for his indulgence in a letter had the ſuggeſtion in that letter been true, relative to the plaintiff's having delivered up the bill to Wheate, that might have made a material difference: but the plaintiff having returned no anſwer to the letter, and the fact not having been attempted to be proved at the trial, it was probable the aſſertion was not warranted. This caſe had no reſemblance to the two preceding caſes which had been cited in argument.

NEITHER will any length of time ſhort of the ſtatute of limitations, nor the receipt of part of the money from the drawer or indorſor, nor a promiſe by indorſement on the bill by the drawer to pay the reſidue, diſcharge the holder's remedy againſt the acceptor.

Ellis v. Galindo, Doug. 238, (250) in the notes.

A BILL was drawn by one brother and accepted by another. When it became due, the payee received of the drawer 31. 15s. 4d. and at the ſame time the following indorſement was made on the bill; "Received on account of this bill 31. 15s. 4d;" "Balance remaining due 26l. 4s. 8d. I promiſe to pay Mr. Thomas Ellis, within three months from the date of this." Signed by James Galindo, who was the drawer. The balance was never paid, and at the diſtance of three years an action was brought againſt the acceptor. The cauſe was tried before Lord Mansfield, who thought the acceptor was diſcharged, and non-ſuited the plaintiff. The ground of his lordſhip's opinion probably was, that the in-

dorſe-

dorſement was as a new bill accepted by the plaintiff in payment of the old; and on an application for a new trial, his lordſhip ſaid he did not think that this caſe at all interfered with the determination in Dingwall and Dunſter. The plaintiff's counſel contended that the indorſement was made to prevent an imputation of neglect, becauſe delay in coming againſt an acceptor may diſcharge a drawer or indorſor. The court all ſeemed to think that this was a queſtion of intention, and ought therefore to have been left to the jury, but they refuſed a new trial on account of the ſmallneſs of the ſum.

But where a merchant, having accepted a bill in a foreign country, has been diſcharged by the laws of that country, he cannot afterwards be ſued here on his acceptance, though the circumſtances under which he was diſcharged there, would not diſcharge him here; becauſe he muſt be taken by his acceptance to have entered into ſuch engagement only as was from thence implied by the laws of the country in which he reſided. Burrows v. Jemino. in Canc. M. 13 G. Str. 733.

By the law of Leghorn, if a bill had been accepted and the drawer had failed, and the acceptor had not ſufficient effects of the drawer in his hands at the time of the acceptance, the acceptance became void. This happening to be the caſe of one Burrows, he inſtituted a ſuit at Leghorn, to diſcharge himſelf of his acceptance, which was accordingly vacated by ſentence in the court there. He afterwards returned to England, and was ſued here on his acceptance; on which he filed a bill in Chancery for an injunction and relief. Lord Chancellor King was clearly of opinion that this cauſe was to be determined according to the laws of the place where the bill was negociated; and the acceptance having been vacated by a competent juriſdiction, that ſentence was concluſive, and bound the court here.

If the drawee offer a conditional acceptance, and the holder, inſtead of acquieſcing, do ſomething which ſhews that he does not admit ſuch acceptance, the drawee is not bound, even if the event afterwards happen on which the acceptance was to depend.

Sproat v. Mathews. 1 Term. Rep. 182.

A BILL payable to one Lenox, or order, forty days afte
ſight, was drawn on the defendant; Lenox indorſed it to th
plaintiff: Allen, the plaintiff's clerk, preſented the bill to th
defendant, who lived in London, for acceptance: the defen
dant told him that the drawer had conſigned a ſhip and carg
to him and another perſon at Briſtol, but as he could no
then tell whether the ſhip would arrive at London or Briſto
he could not accept at that time: on which Allen ſaid th
he would leave the bill upon this condition, that in the even
of the defendant's not accepting it as from the day when
was preſented, he ſhould be at liberty to note it for non-ac
ceptance as from that time: to this the defendant aſſente
and the bill was accordingly left at his houſe till a future da
when Allen called again in company with the plaintiff,
know whether the defendant would accept the bill or no
who, on being preſſed to accept it, ſaid that the bill was a goo
one, and would be paid, even if the ſhip were loſt. Allen im
mediately on this carried the bill to a notary public, a
had it noted for non-acceptance from the time when it w
firſt left with the defendant. The ſhip afterwards arriv
ſafe, at the port of London, and the defendant diſpoſed of t
cargo. This being a conditional acceptance, the conduct
the plaintiff was held to have been a waiver of it, and to ha
precluded him from holding the defendant to his engag
ment.

THOUGH an agreement to accept, on condition of a ce
tain fund being conſigned to the acceptor for the diſcharge
the bill, may amount to an acceptance on the performance
the conditions, yet if the indorſee take the fund out of t
hands of the drawee, he diſcharges him from his engag
ment.

Maſon v. Hunt. Doug. 284. (297.)

ROWLAND Hunt, in Dominica, agreed with a Houſe ther
that his partner, Thomas Hunt, in London, ſhould, on
cargo of tobacco being conſigned to him, with the bills
lading, and an order for inſurance, accept ſuch bills as th
Houſe ſhould draw on him, at the rate of 80l. per hh
from ninety days to ſix months ſight: inſurance for the ſu
of 3600l. was ordered on forty hhds. of tobacco, whi

Thom

Thomas Hunt procured for a premium of 303l. He afterwards received a letter, adviſing him of ſix bills of Exchange being drawn on him for 3200l. in conſequence of Rowland Hunt's agreement, payable to one of the partners of the Houſe, on account of forty hhds. of tobacco, and indorſed by him to Maſon. The bills arrived, and were preſented for acceptance. Thomas Hunt refuſed to accept them, on an apprehenſion that the tobacco was not worth the money at which it was valued. After a negociation of ſome days, Maſon took the bill of lading for the forty hhds. and the policy of inſurance out of the hands of Thomas Hunt. The tobacco afterwards arriving, was received and ſold by the plaintiff Maſon, and produced only 1400l. The occaſion of this difference, between the real produce and the valued price, did not appear. Under the direction of Lord Mansfield, a verdict was given for the defendant, and on an application for a new trial, his lordſhip expreſſed himſelf thus: An agreement to accept, may in many inſtances amount to an acceptance; but an agreement is ſtill but an agreement, and if it be conditional, and a third perſon, knowing of the conditions annexed to the agreement, take the bill, he takes it ſubject to ſuch agreement. Here there were many things ſpecified as the conditions of the acceptance—the number of hhds. to be delivered—of a certain value rated by the hhd.—the inſurance—the bills of lading—the conſignment. On the face of the agreement, I thought at the trial, and ſtill incline to think, that the meaning of the parties was, that tobacco ſhould be conſigned which ſhould be worth 80l. per hhd: this fell immenſely ſhort of that ſum. It is plain the *Hunts* never *meant* to be in advance, and I think ſo great a difference in the value, ſuch a fraud as to intitle the defendants to relief againſt the agreement. But as to this the reſt of the court have doubted, chiefly becauſe there is no evidence to ſhew how the decreaſe in the value aroſe; whether from the inferiority of the quality, or the fluctuation in the market. But the reſt of the court are extremly clear that the ſubſequent conduct of the plaintiff makes an end of the whole, and I think the reaſons are unanſwerable. As to that part of the caſe,

caſe, it ſtands thus: The Hunts ſay, "we are not bou
"This is an impoſition. The tobacco is of inferior val
"The letter repreſents it as worth 80l. the inſurance ma
"it 90l. per hhd. and it turns out not to be worth 40l."
Maſon had meant to ſay, "you are liable, and ſhall pay
"bills," what would his conduct have been? he wo
have left the policy of inſurance and the bills of lading
their hands, and ſued them upon the acceptance. T
temptation to accept was the commiſſion on the conſi
ment, and they were to have the ſecurity of the goods a
the inſurance. But the plaintiff undoes all this, and ſa
then I will take all from you, ſecurity, commiſſion, &
This was ſaying, "I will ſtand in your place, but not ſo
to be anſwerable for more than the produce of the tobacco
It is impoſſible the defendants could mean to accept, with
any benefit or ſecurity. We are all clear that this made
end of the agreement.

1 Ld. Raym. 744. Kellock v. Robinſon. 2 Str. 745. cited 1 Wilſ. 48.

THOUGH the receipt of part from the drawer or indor
be no diſcharge to the acceptor, yet the receipt of part fr
the acceptor of a bill or the maker of a note, is a diſcharge
the drawer and indorſors in the one caſe, and to the indorſ
in the other, unleſs due notice be given of the non-paym
of the reſidue; for the receipt of part from the maker or
ceptor without notice, is conſtrued to be a giving of cr
for the remainder, and the undertaking of the preceding p
ties is only conditional, to pay in default of the origi
debtor, on due notice given: but where due notice is gi
that the bill is not duly paid, the receipt of part of the mo
from an acceptor or maker will not diſcharge the drawer
indorſors; for it is for their advantage that as much ſho
be received from others as may be.

Bul. N. P. 271. cites Johnſon v. Kenyon. C. B. Hil. 5 G. III.

Vid. Johnſon v. Kennion. Wilſ. 262.

THE receipt of part from an indorſor, is no diſcharge of
drawer or preceding indorſor.

IF the drawer of a note, or the acceptor of a bill, be ſued
the indorſee, and the bail for the drawer or acceptor pay
debt and coſts, this abſolutely diſcharges the indorſor as m
as if the principal had paid the note or the bill; and the
can

not afterwards recover againſt the indorſor in the name of indorſee.

Hull v. Pitfield. 1 Wilſ. 46.

Dw Scraiſton drew a note, by which he promiſed to pay ge Pitfield, or order, the ſum of 200l. and indorſed it to ll. Hull brought an action againſt Scraiſton, in which held him to ſpecial bail; Hull recovered interlocutory gment againſt Scraiſton, on which his bail paid the debt coſts, amounting to 230l. 15s. Hull executed an inſtru- t between himſelf on the one part, and the bail on the r, reciting the note, and that he had recovered interlocu- judgment on it againſt Scraiſton: that the bail had pur- ed the note, and paid the debt and coſts, in conſideration hich Hull aſſigned over to them the note and the interlocu- judgment, with a power of attorney to make uſe of Hull's e to ſue the indorſor, and covenanted in the common ner, not to do any act to hinder the bail from recovering money on the note. An action was afterwards brought Hull's name againſt Pitfield the indorſor, on which theſe mſtances were ſtated, and the court held the indorſor diſcharged by the payment by the bail in the former on, as much as if the drawer had paid the money him-

THOUGH, in order to intitle himſelf to call on any of the eding parties, in default of the acceptor of a Bill of Ex- ge, or of the maker of a Promiſſory Note, it be neceſſary the holder ſhould give due notice of ſuch default to the y, to whom he means to reſort, yet notice to that party e is ſufficient as againſt him: it is not neceſſary that any mpt ſhould be made to recover the money of any of the r collateral undertakers; or in caſe of ſuch attempt being e, to give notice of its being without effect. Thus, in r to intitle himſelf to recover againſt an indorſor, it is neceſſary for the indorſee to ſhew an attempt to recover nſt the drawer of a Bill of Exchange, or the payee in- or of a Promiſſory Note.

CONTRADICTORY opinions on this point, however, being d in an early reporter, the court, on a ſubſequent caſe of ction by an indorſee of a *foreign* Bill of Exchange againſt the

1 Salk. 131, 133.

Bromley v. Frazier. 1 Str. 441.

the indorſor, where it was objected that no demand was ma
on the drawer, thought it neceſſary to take time to conſid
the ſubject, and, on mature deliberation, delivered their op
nion, that no ſuch demand was neceſſary to be ſhewn. "T
"deſign of the law of merchants," they ſaid, "in diſtinguiſ
"ing theſe from all other contracts, by making them
"ſignable, was for the convenience of commerce, that th
"might paſs from hand to hand in the way of trade, in t
"ſame manner as if they were ſpecie; now to require a d
"mand on the drawer, would be laying ſuch a clog
"theſe bills, as would deter every body from taking them
"the drawer lives abroad, perhaps in the Indies, where t
"indorſee has no correſpondent to whom he can ſend t
"bill for a demand, or if he could, yet the delay would be
"great, that no body would meddle with them. Suppoſe
"were the caſe of ſeveral indorſements, muſt the laſt indor
"travel round the world before he can fix his action on t
"man from whom he received the bill? In common e
"perience every body knows, that the more indorſement
"bill has, the greater credit it bears; whereas, if thoſe d
"mands were all neceſſary to be made, it muſt naturally
"miniſh the value, by how much more difficult it wo
"render the calling in of the money. And as to the noti
"that has prevailed, that the indorſor warrants only in
"fault of the drawer; there is no colour for it, for ev
"indorſor is in the nature of a new drawer, and at *niſi pri*
"the indorſee is never put to prove the hand of the firſt draw
"where the action is againſt an indorſor. The requiring
"a proteſt for non-acceptance is not becauſe a prot
"amounts to a demand, for it is no more than giving not
"to the drawer to get his effects out of the hands of
"drawee, who by the others drawing, is ſuppoſed to h
"ſufficient wherewith to ſatisfy the bill."

THIS caſe ſettled the law with reſpect to foreign Bill
Exchange; but as to inland bills, great doubts ſtill remain
Theſe were occaſioned by the inaccurate and confuſed m
ner in which ſome caſes were reported, in which it did
appear whether the queſtion aroſe on Bills of Exchang

Promiſ

Promiſſory Notes, and from confounding the term drawer as applied to the latter with the ſame term as applied to the former. There could be no doubt, but that to recover againſt the indorſor of a note, due diligence muſt be ſhewn to have been uſed to obtain payment from the drawer; but in the analogy between the two inſtruments, the drawer of the note does not reſemble the drawer but the acceptor of the bill: from want of attention to this diſtinction reporters have been led to repreſent ſix chief juſtices to have been of different opinions on this point. Holt, Eyre, and Raymond, are ſaid to have held that a demand on the drawer of a bill was neceſſary; and Macclesfield, Pratt, and King, that it was not.

Lambert v. Oakes.

THE principal caſe to which a reference is made to prove that Holt was of opinion, that in actions on Bills of Exchange, it is neceſſary to prove a demand on the drawer, is reported in three different books; Lord Raymond, Salkeld, and 12 Modern.

1 Ld. Raym. 443.

IN Lord Raymond, it appears manifeſtly that the queſtion roſe upon a Promiſſory Note. "R. ſigned a *note* under his hand, payable to Oakes or his order; Oakes indorſed it to Lambert; on which Lambert brought the action for the money againſt Oakes. Per Holt, C. J. He ought to prove that he had demanded, or done his endeavour to demand this money of R. before he can ſue Oakes upon the indorſement. The ſame law if the bill were drawn on any other perſon, payable to Oakes, or order." That is, a demand muſt be made of the perſon on whom the bill is drawn. And other parts of the caſe manifeſtly ſhew this to have been the *meaning*. For my Lord C. J. Holt is reported to have ſaid, "the indorſement will ſubject the indorſor to an action; becauſe it makes a new contract, in caſe the perſon *on whom it is drawn* does not pay it." Again, "if the indorſee does not demand the money payable by the bill, of the perſon, *upon whom* it is drawn, in convenient time, and afterwards he fails, the indorſor is not liable."

127 there called Lambert v. Pack.

IN Salkeld, the caſe is confounded: it is ſtated to be a Bill of Exchange, and "that the demand muſt be made on the drawer, or him upon whom it was drawn." Holt had ſaid that

that a demand muſt be made of the *maker* of a Promiſſ note; (calling him the *drawer*;) and in the caſe of a Bill Exchange, of *him* upon whom the bill is drawn. The rep jumbles both together as applied only to a Bill of Exchan miſled, very probably, by the equivocal meaning of the te *drawer*, and by the chief juſtice's reaſoning in the caſe o Promiſſory Note, from the law upon Bills of Exchange.

244. IN 12 Modern—The caſe is miſtaken too; and ſtated upon a Bill of Exchange, and as a determination that th muſt be a demand upon the drawer of the Bill of Exchan And yet the report itſelf ſhews demonſtrably, that what ſaid by Holt, was applied to the *maker* of a Promiſſory No (calling him the *drawer*.) For the report makes him ar thus—"So, if the bill was drawn on any *other* perſon, paya "to Oakes, or order:" which ſhews that the caſe in ju ment was "not a bill drawn on *another* perſon, but paya "to Oakes by R. *himſelf*."

EVERY inconvenience ſuggeſted in the caſe of foreign B of Exchange, holds in a great degree, and every other arg ment holds equally, in the caſe of inland bills: the indor does not truſt to the credit of the original drawer: he d not know whether ſuch a perſon exiſts, or where he liv or whether his name may have been forged. The indorſo his drawer, and the perſon to whom he originally truſted caſe the drawer ſhould not pay the money. And it is wo while to obſerve that the act of William the third requi notice of the proteſt to be given to the perſon *from wh* the bill was received." He may have another remedy agai the firſt drawer as aſſignee to the indorſor, and ſtanding his place.

Heylin v. Adamſon. 2 Bur. 669. ON theſe principles it is now finally ſettled, that to ent the indorſee to recover againſt the indorſor of an *inland* B of Exchange, it is not neceſſary to demand the money of firſt drawer.

ANTIENTLY a diſtinction ſeems to have been taken tween the caſe of a Bill of Exchange, given in payment precedent debt, and that of one given for a debt contracted the time the bill was given. In the latter caſe the per

who received it must have used due diligence to recover the money of him on whom it was drawn; otherwise he could not resort to the party from whom he received it, and charge him on the original contract. But in the former case, the bill was not considered as payment, unless the money was paid by the drawee, and no diligence seems to have been necessary in the holder to obtain that payment, nor any notice to the person from whom he received it of the failure in payment; that this was once held to be the law, the following case is a proof.

Clarke v. Mundal. 3 Wil. & M. cor. Holt. C. J. at Guildhall. 1 Salk. 124. 3 Salk. 68.

One Mundal, having a Bill of Exchange payable to him, indorsed it to Clarke, to whom he was indebted: Clarke afterwards brought an action on the original contract against Mundal, who, in his defence, gave in evidence, this bill indorsed to Clarke, who had kept it so long in his hands after it became payable, that it ought to be considered as money paid: but the chief justice refused to receive this as evidence of payment; but took the distinction above mentioned, saying, that if A sells goods to B, and B is to give a bill in satisfaction, B is discharged, though the bill be never paid, for the bill is payment: that however in the case of a precedent debt, if part of the money on the bill were paid, it should go in discharge of so much.

S. 7.

But by the statute of Queen Ann before mentioned it is enacted, "that if any person accept a Bill of Exchange for and in satisfaction of any former debt, or sum of money formerly due to him, this shall be accounted and esteemed a full and complete payment of such debt, if such person accepting of any such bill for his debt do not take his due course to obtain payment of it, by endeavouring to get the same accepted and paid, and make his protest according to the directions of the act, either for non-acceptance or non-payment."

Beawes, 476.

If a Bill of Exchange be lost by him with whom it was left for acceptance, or if by mistake he have given it to a wrong person, or on any other account the holder cannot obtain a return of his bill, either accepted or unaccepted, he who lost it must give the person to whom it was payable, or to his order,

order, a note of hand for payment of its amount, on the d
it becomes due, on delivery of the ſecond if it arrive in tim
or if not, on the ſame note, which in all caſes is to have t
law and privileges of a Bill of Exchange; and if the accept
refuſe this, the holder muſt immediately proteſt for non-a
ceptance, and when due muſt demand the money, (though
have neither note nor bill) and if that be refuſed, a prot
muſt be regularly made for non-payment.

Mar. 19, 20. MARIUS adviſes, that as ſoon as the poſſeſſor of a b
miſſes it, he ſhould have immediate recourſe to the accepto
and in the preſence of a notary and two witneſſes, acquai
him with its being loſt; and ſignify to him that at his pe
he pay it to none but thoſe with his order: and he adds, th
no one ſhould refuſe payment of a bill he has accepted mere
becauſe it is miſſing: as *he* aſſerts, that proteſt being ma
for non-payment, on offer of a ſufficient ſecurity and i
demnification, will oblige the acceptor to make good a
loſſes, re-exchange, and charges, as having wilfully occa
ſioned them.

8. 3. So, by the ſtatute of William, it is provided, that "in ca
"any *ſuch* inland Bill or Bills of Exchange," as mentioned
the former part of the act, "ſhall happen to be loſt or miſca
"ried within the time before limited for payment of th
"ſame, then the drawer of the ſaid bill or bills is and ſha
"be obliged to give another bill or bills of the ſame tena
"with thoſe firſt given, the perſon or perſons to whom the
"are and ſhall be ſo delivered giving ſecurity, if demande
"to the ſaid drawer, to indemnify him againſt all perſo
"whatſoever, in caſe the ſaid Bill or Bills of Exchange ſ
"alledged to be loſt or miſcarried, ſhall be found again."

BUT if a bill loſt by the poſſeſſor ſhould afterwards com
into the poſſeſſion of any perſon who ſhall have paid a fu
and valuable conſideration for it, without knowledge of th
circumſtance of its having been loſt, the drawer and th
Vid. page 67, 68. acceptor, if the bill was accepted, and the drawer, if it w
not, muſt pay it when due to ſuch a fair poſſeſſor: ſo th
Marius's law ſeems very doubtful, and the proviſion of th
ſtatute may in many caſes be uſeleſs to the loſer of the bill.

Bu

But againſt the perſon who finds the bill, the real owner may maintain an action of trover. 1 Salk. 126. 1 Ld. Raym. 738.

CAP. VIII.

Of the Remedy on a BILL *or* NOTE.

BEFORE the doctrine of Bills of Exchange was well underſtood, and the nature and extent of the cuſtoms relative to them fully recognized by the courts, the remedy on them was ſought in different forms of action, according to the opinions which were entertained of the applicability of theſe ſeveral forms to the reſpective ſituations of the parties.

Of caſes, however, where a remedy was ſought in any other form of action than that founded on the cuſtom reſpecting Bills of Exchange, or on the ſtatute reſpecting Promiſſory Notes, the reports are but few; and of theſe few ſome are ſo inaccurate, and in others the judges expreſs themſelves in terms ſo vague, that it is not eaſy to deduce from them any general rule.

In one book it is laid down that the *payee* of a bill cannot maintain an action of debt againſt the acceptor, becauſe there is no privity between them, becauſe the acceptance does not create a duty, any more than a promiſe by a ſtranger to pay, if the creditor forbear his debt, which renders the ſtranger liable, but not in an action of debt, and becauſe on a ſearch for precedents, no one could be found of an action of debt on the acceptance of a Bill of Exchange. Hardr. 485, 487.

In another caſe, reported in ſeveral books, it is laid down that an *indebitatus aſſumpſit* will not lie on the acceptance of a Bill of Exchange; perhaps on the ſame principle that it is determined that debt would not lie, for an alluſion is made to the former caſe. Brown v. London. 1 Mod. 285. 1 Vent. 152. 1 Freem. 14. 1 Lev. 298. D. 11. Mod. 190. Comb. 204.

In other books, it is laid down in general terms that an *indebitatus aſſumpſit* will not lie on a bill. 1 Salk. 125. 12 Mod. 37.

In one of theſe, however, in another place, it is held that 12 Mod. 345.

the payee of a bill which imports to have been given for value received, may maintain indebitatus aſſumpſit againſt the drawer.

Skinn. 346. AND in another it is ſaid, that it will *only* lie againſt the drawer, on a bill which appears to have been given for value received.

Welſh. v. Craig, or Creagh. Str. 680. 8 Mod. 373. ON a Promiſſory Note a caſe is reported in two books but in a manner ſo inaccurate, that it can only be collected that in that particular caſe it was determined, that debt would not lie; for it does not appear between what parties the action was, though the aſſertion is general that debt will not lie on a Promiſſory Note.

1 Mod. Ent. 312. pl. 13. IT is ſaid in another place, that debt will lie againſt the maker of the note, though not againſt the indorſor.

Morg. Prec. 548. AND a very able pleader has given a precedent of a declaration in debt by the adminiſtratrix of the payee of a note againſt the maker.

Keſſebower v. Tims. B. R. E. 22 G. III. Bailey 47. IT has been alſo held by Lord Mansfield that the indorſee of a note might maintain *indebitatus aſſumpſit* upon it, against the perſon who indorſed it to him.

THE concluſion, reſulting from the whole, ſeems to be this that where a privity exiſts between the parties, there an action of debt or *indebitatus aſſumpſit* may be maintained; but that where it does not exiſt, neither of theſe actions will lie.

A PRIVITY exiſts between the payee and the drawer of a Bill of Exchange, the payee and drawer of a Promiſſory Note; the indorſee and his immediate indorſor of either one or the other, and perhaps between the drawer and acceptor of a bill; provided that in all theſe caſes, a conſideration paſt reſpectively between the parties.

BUT it ſeems to be conſidered, that no privity exiſts between the indorſee and acceptor of a bill or the maker of a note, or between an indorſee and a remote indorſor of either.

THE action which is now uſually brought on a Bill of Exchange is a ſpecial action on the caſe, founded on the cuſtom of merchants. That cuſtom was not at firſt recognized by the court, unleſs it was ſpecially ſet forth, and therefore it was deemed neceſſary to ſet forth by way of inducem-

D. per Powel J. 11. d. Raym. 21.

inducement, ſo much of it as applied to the particular caſe, and impoſed on the defendant a liability to pay. Vid. 1 Wilſ. 189.

THUS in an action by an indorſee againſt the acceptor, it was neceſſary to ſtate a cuſtom among merchants, that "if any merchant drew a Bill of Exchange, and directed it "to his correſpondent, and by that bill requeſted his correſ- "pondent to pay a ſum of money to a third perſon, or to "his order, and the correſpondent accepted the bill, then if "the perſon to whom or to whoſe order the money was to "be paid, indorſed the bill, the acceptor, on the bill's being "preſented to him for payment, by the perſon to whom it "was indorſed when it became due, by the cuſtom of mer- "chants, became liable to pay the money to the indorſee:" then the particular circumſtances of the caſe were ſtated as coming under that part of the general cuſtom on which the action was brought.

So, in an action by an indorſee againſt the drawer for non-payment by the acceptor, it was neceſſary to ſtate that, "there was a certain cuſtom among merchants, that if a "merchant drew a Bill of Exchange, and directed it to his "correſpondent, and by that bill requeſted him to pay a ſum "of money to a third perſon, or his order, and the correſ- "pondent accepted the bill, then if the perſon to whom, or "to whoſe order the money was to be paid, indorſed the bill, "and the indorſee preſented the bill to the acceptor when "due, who refuſed payment, then if the indorſee proteſted it, "and returned it to the drawer, together with the proteſt, "the drawer, by the cuſtom of merchants, was liable to pay "the principal ſum, with damages ariſing from non-payment "at the time," and then to ſtate the circumſtances in the particular caſe, to ſhew that it fell within the cuſtom. Vid. Richardſon's Practice. C. B. vol. 2. p. 74.

So, if a man ſubſcribed a bill for himſelf and partner; in an action againſt them on this ſubſcription, it was thought pru- dent to ſtate a cuſtom, "that, if two were partners, jointly "merchandizing together, and if one of them ſubſcribed a "bill for the payment of money by him and his partner, "mentioned there, to another, and his order, then both the "partners were bound to that perſon; and that if the perſon Vid. Pinkney v. Hall. 1 Ld. Raym. 175.

" to whom this bill was payable, indorſed it to another, " then thoſe partners ought to pay ſuch bill, on notice, to " him to whom it was ſo indorſed:" and then to ſtate the facts coming under this cuſtom.

Vid. 3 Mod. 86.

WHERE the action was on an inland Bill of Exchange, it was uſual to lay the cuſtom as exiſting between the two

Vid. 4 Mod. 242.

cities where the drawer and acceptor lived; and if both lived in the ſame place, to alledge its exiſtence between merchants and others reſiding in that place.

3 Mod. 226. Carth. 83, 270. 1 Show. 130.

BUT when the cuſtom of merchants was recognized by the judges as part of the law of the land, and they declared they would take notice of it as ſuch *ex officio*, it became unneceſſary to recite the cuſtom at full length; a ſimple allegation that " the drawer, mentioning him by his name, *accord* " *ing to the cuſtom of merchants*, drew his Bill of Exchange " &c." was ſufficient.

AND if the plaintiff, ſtill adhering to former precedents, thought proper to recite the cuſtom in general terms, and did not bring his caſe within the cuſtom ſo ſet forth; yet by the law of merchants, as recognized by the court, the caſe as ſtated intitled him to his action, he might recover, and the ſetting forth of the cuſtom was reckoned ſurpluſage and rejected.

Mogadara v. Holt. 1 Show. 317.

THUS, where the plaintiff ſet forth a cuſtom of merchants that if the merchant to whom the bill is directed, accepts after indorſement, and fail of payment to the indorſee *at a time*, in ſuch caſe, on the bill's being proteſted for non-payment, and notice of it given to the drawer, the latter becomes liable to pay the ſame, with damage to the indorſee: and the caſe ſet forth was, that the indorſee had preſented it to the drawee *a month after the time* of payment, who accepted but failed to pay it, on which it was proteſted, and notice given to the drawer: though this cuſtom does not come within the cuſtom ſet forth, yet becauſe by the law of merchants an action might be ſuſtained on this caſe, the declaration was held good, and the cuſtom rejected as ſurpluſage.

2 Ld. Raym. 1542.

ON the ſtatement of any material fact, it is ſtill uſual to allude to the cuſtom, by alledging that it was done " accord- " ing to the cuſtom from time immemorial uſed and appr-

"ed among merchants:" but even that is unneceſſary, it being ſufficient if the facts ſtated come within the cuſtom as recognized.

As the action on a Bill of Exchange is founded on the cuſtom of merchants, ſo that on a Promiſſory Note is founded on the ſtatute, and uſually refers to it; though, it is conceived, ſuch reference is as unneceſſary in this caſe, as that to the cuſtom in the other. 3 & 4 Ann. c. 9.

In both caſes however it is neceſſary, that all thoſe circumſtances ſhould either be expreſsly ſtated, or clearly and inevitably implied, which, according to the characters of the parties to the action, muſt neceſſarily concur in order to intitle the plaintiff to recover.

In all caſes ariſing on a Bill of Exchange, it is neceſſary to ſtate that the drawer made his bill, and directed it to the drawee, and thereby directed him to pay.

In all thoſe ariſing on a Promiſſory Note, that the maker made his Promiſſory Note, and thereby promiſed to pay.

In ſtating the Bill or the Note, regard muſt be had to the legal operation of each reſpectively. 1 Bur. 324, 325.

It has been decided that the legal operation of a Bill or of a Note, payable to a fictitious payee, is, that it is payable to the bearer, and therefore if that deciſion be right, it is proper, in the ſtatement of ſuch a bill, to alledge that the drawer thereby requeſted the drawee to pay ſo much money to the bearer; in the ſtatement of ſuch a note, that the maker thereby promiſed to pay ſuch a ſum to the bearer; but this queſtion is yet under review, in a writ of error in the Houſe of Lords. Vere v. Lewis. 3 Term. Rep. 183. Minet v. Gibſon. Id. 485. Collins v. Emett. Bl. Term. Rep. C. B. 313.

Or in ſuch a caſe, the plaintiff may ſtate all the ſpecial circumſtances, and if the verdict correſpond with them, he will be intitled to recover.

Thus, where the plaintiff ſtated that the defendant, on the fifth of April, 1788, drew a Bill of Exchange, directed to Liveſay and Co. by which he required them, three months after date, to pay to *Mr. George Chapman, or order*, 1,551l. value received, and delivered the ſaid bill to them, and "authorized them to negociate and indorſe the ſame in the name of George Chapman, and thereby to raiſe money Collins v. Emett.

" thereon," for the uſe of the ſaid perſons ſo uſing the names, ſtile, and firm of Liveſay and Co.; and then averred, that when the ſaid bill was ſo made as aforeſaid, or at any time afterwards, " there was no ſuch perſon as George Chap- " man, the ſuppoſed payee" in the ſaid Bill of Exchange, but that the ſaid name was merely fictitious," to wit, at London, &c. which ſaid Bill of Exchange afterwards, to wit, &c. by one " Andrew Goodrick, being a perſon there- " unto in that behalf lawfully authorized by Liveſay and Co. " upon ſight thereof was accepted," according to the uſage and cuſtom aforeſaid. And the ſaid perſons ſo uſing the names of Liveſay and Co. being ſo authorized as aforeſaid, afterwards and before the payment of the ſum of money therein contained, or of any part thereof, and before the time thereby appointed for ſuch payment, to wit. &c. " negociated and in- " dorſed the ſaid Bill of Exchange, in and with the name of " the ſaid George Chapman, and by that indorſement, in the " name of the ſaid George Chapman, appointed the con- " tents of the ſaid Bill of Exchange to be paid to the ſaid " plaintiffs, and thereby raiſed money thereon, for the uſe of " the ſaid perſons ſo uſing the names, &c. of Liveſay and " Co." and then and there delivered the ſaid Bill of Exchange ſo indorſed to the ſaid plaintiffs, " who, thereupon, on " the credit thereof, advanced to the ſaid perſons," ſo uſing the name, &c. of Liveſay and Co. the ſum of money in the bill mentioned.

THE circumſtances ſtated in a ſpecial verdict on this caſe were theſe, that Emett, who was a partner with Liveſay and Co. in the ſpinning of cotton at Clithero, wrote his name on a piece of blank paper, with a ſhilling ſtamp on it; and delivered it to Liveſay and Co. for the purpoſe of drawing a Bill of Exchange, for ſuch ſum, payable at ſuch time, and to ſuch perſon or perſons as they ſhould think fit.

THAT Liveſay and Co. on the 5th of April, 1788, drew on this paper, above the name of Emett, a certain writing directed to Liveſay and Co. in the words and figures following, viz. "*Clithero*, April 5, 1788. £. 1,551. Three months after date pay to *Mr. George Chapman, or order*, fifteen hundred and fifty

fifty-one pounds, value received, as advised, John Emett." That the occasion and manner of giving this paper writing were as follow: on the 5th of April, Livesay and Co. were indebted to Thomas Jeffery in the sum of 1,512l. 9s. on a Bill of Exchange, which became due that day, and which had been previously given for goods sold by Jeffery to them. One Richard Collis, clerk to Jeffery, on that day applied to the house of Livesay and Co. for payment of that bill; he there saw Anstie, one of the partners, who informed him, that they could not conveniently then pay the money, but requested him to take a bill on their house, for the sum, at three months date, and the interest in the mean time, and gave him the blank paper above mentioned, with the name of Emett written on it, to be filled up by one of the clerks of the house.

That one Ludlow, a clerk of Livesay and Co. filled up the paper in the manner as above set forth; that immediately afterwards it was carried to Andrew Goodrick, another clerk of the house, who was authorised by Livesay and Co. to accept it, which he accordingly did, in the names of Livesay and Co.: that with the authority of Livesay and Co. the name of George Chapman was then indorsed on the said paper writing, which being so filled up, accepted, and indorsed, was then delivered to the said Collis, who then delivered up the bill for 1,512l. 9s. to the said Livesay and Co. That the said Thomas Jeffery afterwards negociated the said paper writing with the plaintiffs, and received the full amount from them, only deducting a discount, at 4½ per cent. and delivered the same to the said plaintiffs. That the same was duly presented for payment to Livesay and Co. who refused to pay it, of which Emett had due notice. That there was no such person as George Chapman, the supposed payee of the said paper writing, being merely fictitious; that Emett gave no further or other authority than as before set forth, and knew nothing of this transaction. That the plaintiffs had then no knowledge that the said George Chapman was a fictitious person, or of the circumstances under which the said paper writing was drawn, accepted, and indorsed, but that the said

Thomas Jeffery had full knowledge of the whole of the fai transactions.

In pronouncing the judgment of the Court of Commo Pleas on this case, Lord Loughborough said, the special cir cumstances above stated in the declaration, would, in his opi nion, have been sufficient to have intitled the plaintiff to re cover, if the case stated in the special verdict had not, in tw or three instances, varied from them.

A Bill or Note payable to the order of a man, may, i an action by him, be stated as payable to himself, for that i its legal import: or it may be stated in the very words of i with an averment that he made no order.

Semb. 1 Bur. 323.

If a note purport to be given by two, and be signed onl by one, a declaration generally as on a note by that one wh signed it will be good; for the legal operation of such a no is, that he who signed it promised to pay.

Burchell v. Slocock. 2 Ld. Raym. 1545.

On a note to pay jointly *and* severally, a declaration again one in the terms of the note will be good.

Butler v. Malissey, Str. 76. Neale v. Ovington. 2 Ld. Raym. 1544. 2 Str. 819.

Where a note is given by two, to pay jointly *or* several the payee may sue both or either; if he sue both, he may de clare on the note in the words of it jointly *or* severally: b if he sue either of them singly, it was formerly held that h could not declare in that way, but that he must state the no as given only by one, and that the joint *or* several note wou be good evidence to support such a declaration.

Rees v. Abbot. Cowp. 832.

But the doctrine in the latter case has been since ove ruled, and it is now held, that in an action on a joint several Promissory Note, against one, a declaration that and another made their Promissory Note, by which th *jointly or severally* promised to pay, is good: for if *or* must understood as a disjunctive, the election whether the note sh be joint or several, is in the person to whom it is given, a by suing one, he shews his election to consider it as a seve note: but in this case, the true construction of the word is, that it is synonimous with *and*. They both promise t *they* or *one* of them shall pay; therefore the liability is *both*, and on *each*. The nature of the transaction forces t construction.

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AND if the note had been joint only, and it had been ſtated as a ſeveral one, no advantage could have been taken of this but by a plea in abatement. Ibid. per Buller, J.

WHERE the payment of a bill or note is limited at a certain time after the date, it muſt be ſtated as being made on the day of the date, that it may appear on the face of the declaration, at what time it became due; if the bill have no date, as on the day when it iſſued, or the firſt day the plaintiff had knowledge of its exiſtence; for an inſtrument not dated muſt be conſidered as dated at the time of the delivery. 1 Str. 22, 2 Ld. Raym. 1082.

BUT in ſtating the bill or note, it is not neceſſary to allege that it bore date, though that be generally done; it is ſufficient that the date appear by implication, which it does from the allegation, that on ſuch a day the drawer made the bill or note. 2 Show. 432.

IT muſt be alledged, that the bill or note was made at ſome certain place: if the action be on a bill dated abroad, that muſt be the place where it was actually made; but where it is neceſſary to prove, at the trial, the making of the bill, which is only in an action againſt the drawer, then in ſtrictneſs that place in England or Wales where the action is laid, ought to be ſubjoined under a videlicet, in deference to the ancient rule of pleading with reſpect to the *venue:* by the precedents, however, that ſtrictneſs ſeems now to be diſregarded, and the place of the videlicet ſupplied in a ſubſequent part of the declaration, by an allegation that the drawer had notice of the default of the drawee at the place where the action is laid, or that he there undertook to pay. Vid. Morg. Prec. 47.

INLAND Bills and Notes may be ſtated to have been made at any place where the plaintiff chooſes to lay his action, becauſe the action on them is tranſitory, and may be ſtated to have ariſen any where.

BUT it is ſaid, that "on a bill dated at any place in England or Wales, and payable abroad at uſance, the bill ſhould be ſtated to have been made at the place where it bears date;" for what reaſon this ſhould be done in this caſe, any more than in any other, does not appear: if the uſance be- Bailey 54.
tween any place abroad and the different towns of this country

try differed, it might be ſuppoſed that exactneſs in ſtating the very place from whence the bill bears date might be materia to aſcertain what the uſance is; but as the uſance betwee other countries and any one place in the kingdom is the ſame as between thoſe ſame countries and any other place that reaſon fails; it would alſo fail, if the uſance varied reckoned from different places of this kingdom to the ſam place abroad; for it is an eſtabliſhed rule, that where a bill payable at uſance, it muſt be averred what that uſance is because uſances differing according to the places betwee which they are reckoned, the court cannot in any inſtan take notice *ex officio* what they are; and that averment ascertaining the time when the bill is payable, it ſeems imm terial from what place the bill is ſtated to be dated.

Buckley v. Campbell. 1 Salk. 13.

Ereſkine v. Murray. 2 Ld. Raym. 1542, 1543. Taylor v. Dobbins. M. 7. G. 1. B. R. 2 Ld. Raym. 1543. Elliot v. Cooper. 2 Ld. Raym. 1376.

IN ſtating the drawing of a Bill or Note, it is unneceſſary ſay that the drawer ſubſcribed it with his own hand writin though that is generally done; the allegation that he ma his Bill of Exchange or Promiſſory Note, and, in the caſe the former, that he directed the bill to the drawee, by whi he requeſted him to pay, and in the caſe of the latter, that ſuch note he promiſed to pay, ſufficiently implies that name was ſomewhere on the inſtrument, and that he or ſom body by his authority wrote it; otherwiſe it could not w propriety be ſaid that he requeſted in the one caſe or promi in the other.

Vid. 12 Mod. 346.

IF the bill was in fact drawn by a ſervant, by the author of a maſter, it is ſufficient to ſtate it as drawn by the maſ himſelf, unleſs the ſubſcription be alledged, and then it m be ſtated according to the truth of the caſe, that the ſerva by the authority of his maſter, drew and ſubſcribed the bill his maſter's account.

Vid. 12 Mod. 564.

THE ſame obſervations apply to the caſe of an indorſeme or acceptance by the ſervant, by the authority, and on the count of his maſter.

WHERE partners are concerned in the drawing, ne ciating, or accepting of a bill or note, the uſual way of int ducing the partnerſhip, is to mention it by way of indu ment, and to ſtate that one of them, according to cuſt

ſtom of merchants, ſubſcribed, accepted, or indorſed the Vid. Morg. Prec. 43.
ll for the partnerſhip account: but the alluſion to the
ſtom is not abſolutely neceſſary; nor is it abſolutely ne-
ſſary that it ſhould be directly charged that the partner ab. 2 Ld. Raym. 1484.
ing for the reſt ſubſcribed, accepted, or indorſed for the
rtnerſhip; it is ſufficient if, on the whole, it appear to have
en ſo.

WHERE a bill is drawn in ſets, and the action is brought Ellington v. Haſt. 2 Ld. Raym. 830. 1 Salk. 130. Wegerſloſe v. Keene. 1 Str. 214.
the firſt, the uſual way of ſtating the requeſt to the
awee is, "that he requeſted him to pay that firſt of ex-
change, (ſecond and third not paid) following the very
rm of the bill;" and then it is not neceſſary, in the ſubſe-
ent part of the declaration, to aver that the ſecond and
ird were not paid, for if either of them was paid, that
ould be a ſufficient defence at the trial.

DELIVERY being neceſſary to give the bill an operation,
muſt be ſtated that the drawer delivered it to the payee.

As the holder, in order to intitle himſelf to recover againſt Vid. page 76.
e drawer or indorſor, is not bound to preſent the bill for
ceptance, when it is payable at a certain time after the
e, ſo in that caſe it is not neceſſary to ſtate any accept-
ce; but if it was payable at a certain time after ſight, it is
ceſſary to ſtate that the bill was preſented for acceptance,
d if the truth will permit, that it was accepted; or that the
awee could not be found, or refuſed to accept.

IN an action againſt the acceptor, it muſt be alledged that Ereſkine v. Murray. 2 Str. 817. 2 Ld. Raym. 1542.
accepted the bill, for the acceptance is the foundation of
action; but the manner of acceptance needs not to be al-
ged.

AND if the acceptance be alledged generally without any
cification of time, evidence of acceptance after time of
ment will maintain the declaration, though the acceptance
alledged to have been according to the tenor and effect of
bill, for this ſhall be conſtrued as a general promiſe to 1 Ld. Raym. 364, 365, 574, 575. 1 Salk. 127, 129. Carth. 459.
the money, and the words "according to the tenor and
ffect of the bill" ſhall be rejected as ſurpluſage; but if
acceptance be alledged to have been *before* the time of
ment, perhaps evidence of an acceptance after, will not do.

IF

If the bill or note was payable to order, and the action an indorſee, ſuch indorſements muſt be ſtated as to ſhew title; an indorſement by the payee muſt at all events ſtated, becauſe without that, it cannot appear that he m any order, on the exiſtence of which depends the title of indorſee. If the firſt indorſement was ſpecial, to any per by name, in an action by an indorſee after him, his indor ment muſt for the ſame reaſon be ſtated: ſo alſo muſt ſpecial indorſements.

Vid. page 58, 59, 60.

But if the indorſement was in blank, and the action againſt the drawer, acceptor, or payee, no other indorſem is neceſſary to be ſtated than that of the payee: in an a againſt a ſubſequent indorſor, his indorſement at leaſt m be added: in an action on a bill or note payable to bearer, indorſement needs be ſtated, becauſe it is transferable wit indorſement.

As a bill may be negociated at any time after it iſſues, immaterial on what day the indorſement is ſtated to been; but if it be ſtated to have been before the time the or note became due, an indorſement afterwards will prob be conſidered as a variance. It is not eſſential to ſtate a livery by the indorſor; that he indorſed the bill or note, plies that he delivered it.

Vid. ſupra.

Ruſhton v. Aſpinall. Doug. 679. (654.)

In an action againſt the drawer or indorſor of a bill againſt the indorſor of a note, it is abſolutely neceſſary account of non-payment of the bill or note, to ſtate a dem of payment from the acceptor of the bill or the maker of note, and due notice of refuſal given to the party ag whom the action is brought; for theſe circumſtances are ſolutely neceſſary to intitle the plaintiff to maintain hi tion; and a verdict will not help him on a writ of error general rule of pleading in this caſe is, that where the p tiff omits altogether to ſtate his title or cauſe of action, not neceſſary to prove it at the trial, and therefore there room for preſumption that there was actual proof: wh demand on the acceptor, or notice to the defendant ar laid, there is no neceſſity to prove them; and if it were preſumed that they were proved, no proof can make g declar

declaration, which contains no ground of action on the face of it; and though it be alledged that the defendant promiſed, that will not help the caſe; the promiſe is an inference of law, and the declaration muſt contain premiſes from whence that inference may be drawn.

But if the title be only imperfectly ſtated, with the omiſſion only of ſome circumſtances neceſſary to complete the title, they ſhall after a verdict be preſumed to have been proved; and in ſome caſes no advantage can be taken of the want of them on a general demurrer.

Thus due notice of the diſhonour of a foreign bill can only be given by proteſt; yet the omitting to alledge a proteſt in the declaration is only matter of form; notice being alledged generally, it ſhall be preſumed to have been given with all the neceſſary formalities, and if theſe be not proved at the trial, the plaintiff cannot recover. Salomons v. Stavely. B.R.M. 24 G. III. Doug. 684 in the notes.

It is not neceſſary, in an action againſt an indorſor, to ſtate that the indorſee demanded the money of the drawer of a bill, or the firſt indorſor of a note, becauſe ſuch demand is not neceſſary to be made, in order to complete the title of the indorſee. Vid. ante page

Whether the drawer of a bill, or the indorſor of a bill or of a note, receiving the bill or the note in the regular courſe of negociation before it has become due, can maintain an action on it, againſt the acceptor or maker, in the character of indorſee, ſeems undecided; no caſe of that kind is reported in any book that I have had an opportunity of conſulting: but ſuch actions have been brought has been incidentally ſaid by the bench: there ſeems no good reaſon why they may not be maintained: but the only caſe in which it is directly held, that the drawer may maintain an action in the character of indorſee, is no authority to eſtabliſh this point: there it appears that the bill was proteſted for non-payment before the indorſement; and a more recent caſe, determined on principle, clearly ſhews that a drawer or indorſor cannot maintain an action againſt the acceptor in the character of indorſee, where the indorſement is after the refuſal of payment; Per J. Aſhhurſt. Tr. 14 G. III. Louviere v. Laubray. 10 Mod. 36. Beck v. Robley. Tr. 14 G. III. B. R. Bl. Term. Rep. C. B. 89 in the notes.

payment; becauſe when a bill is returned unpaid, either the drawer or indorſor, its negotiability is at an end.

Vid. Symonds v. Parminter. 1 Wilſ. 185. Vid. Morg. Prec. 43, 44, 50.

THE action therefore in which the drawer or indorſor, after payment of the money in default of the acceptor, may recover, the firſt againſt the acceptor, and the latter against any of the preceding parties, muſt be brought in the original capacity as drawer or indorſor, and not as indorſee.

2 Show. 180.

IN this action, after ſtating the drawing of the bill, the delivery, the neceſſary indorſements, the preſentment for acceptance, and the acceptance or refuſal to accept, it muſt further ſtated, that at the proper time it was preſented to the acceptor for payment, who refuſed, or that the acceptor could not be found; and if on a foreign bill, a proteſt for non-payment may be ſtated; then that it was returned to the plaintiff, and that the defendant had notice of the premiſes.

1 Wilſ. 185.

IT may alſo be ſtated, that the plaintiff paid the contents of the bill, and, in the caſe of a proteſt, the coſts, intereſt, and damages ariſing from the delay; but this does not ſeem abſolutely neceſſary; that the bill was returned to the plaintiff implies payment by him.

Vid. Morg. Prec. 44.

Vid. Smith v. Niſſen. 1 Term. Rep. 269.

IF the drawee, without having effects of the drawer, accepts and duly pay the bill, without having it proteſted, he may recover back the money in an action for money paid, laid out, and expended to the uſe of the drawer.

Vid. ante page 98.

ANY one who has accepted and paid the bill under proteſt for the honour of the drawer or indorſor, may have a ſpecial action on the cuſtom againſt the perſon for whoſe honour it was accepted and paid.—So alſo may he who has paid under proteſt for the honour of the acceptor; and if in accepting or paying for the honour of any one, he, who does it, retain the drawer and acceptor, and all others obliged to him in due form of law, he may ſue the drawer, acceptor, or any of the prior indorſors *.

* A precedent of a declaration by a perſon who has paid a bill under proteſt, may not be unacceptable here.

London, } A. B. complains of C. D. &c. for that whereas there is,
to wit. } and from time whereof the memory of man runneth not to the contrary, there hath been a certain antient laudable cuſto

It is not neceſſary, in any action on a Bill of Exchange or romiſſory Note, to ſtate an expreſs promiſe by the de-ndant: the law implies a promiſe where the party is liable; d therefore it is ſufficient, after ſtating the circumſtances, to y, that by theſe he became liable to pay. Starkey v. Cheeſeman. 1 Ld. Raym. 538. 1 Salk. 128. Carth. 409.

BUT

ed and approved of between and amongſt merchants and other rſons reſiding, trading, and uſing commerce in parts beyond the ſeas, d with merchants reſiding, trading, and uſing commerce within is kingdom of England, that is to ſay, that if any merchant or other rſon, merchants or other perſons, reſiding, trading, and uſing com-erce in parts beyond the ſeas, ſhall at any time have made any Bill Exchange in writing, and ſhall have directed the ſame to any mer-ant or other perſon, merchants or other perſons, reſiding, trading, d uſing commerce within this kingdom, and by ſuch bill ſhall have quested ſuch perſon or perſons to whom ſuch bill ſhall have been ested to pay, at a time in ſuch bill mentioned for that purpoſe, to the der of any other merchant or other perſon, merchants or other per-ns, reſiding, trading, and uſing commerce beyond the ſeas, any ſum money, mentioned in ſuch Bill of Exchange, and if ſuch merchant other perſon, merchants or other perſons, to whoſe order the pay-ent of any ſuch ſum of money mentioned in ſuch bill, by ſuch bill all have been appointed to be made, ſhall have indorſed ſuch bill, d by ſuch indorſement ſhall have ordered or appointed ſuch ſum of oney mentioned in ſuch bill to be paid to any other merchant or erchants, or other perſon or perſons, reſiding, trading, and uſing mmerce in parts beyond the ſeas, or in this kingdom, or his order; d if ſuch merchant or other perſon, merchants or other perſons, to om ſuch bill ſhall have been directed, ſhall have accepted ſuch bill, d ſhall not have paid the money mentioned therein, when the pay-ent thereof ſhall have become due and payable, to the perſon or per-s to whom ſuch bill ſhall have been indorſed, and ſuch money by ch bill made payable, and thereupon the merchant or perſon, mer-ants or perſons, to whom ſuch bill ſhall have been indorſed, ſhall ve cauſed ſuch bill to be proteſted for ſuch non-payment thereof, and after ſuch proteſt of ſuch bill ſo made, any perſon or perſons, for the nour of the drawee or drawer or of any of the drawers of ſuch bill, all have paid to ſuch perſon or perſons, who ſhall have cauſed ſuch l to be proteſted as aforeſaid, ſuch ſum of money mentioned in ſuch l, for the ſaid bill, retaining nevertheleſs the drawers and acceptors ſuch bill, and all others concerned or obliged to him in due form

of

1 Vent. 153. Vid. 1 Salk. 24.

But it is usual to alledge an express promise after stating the liability, that no exception may be taken to the additional of other counts in assumpsit, which are usually added; for it is said that where the declaration was upon the custom and likewise on an *indebitatus assumpsit*, the judgment was arrested

of law, that then and in such case, such merchant or other person, who shall have accepted such bill, during time of which the memory of man runneth not to the contrary, hath been liable to pay to such person, who upon such protest shall have paid such sum of money to such indorsee or indorsees of such bill, the said sum of money mentioned in such bill, and thereby to him or them made payable: And whereas, at the several times hereafter mentioned, one W. J. and one J. F. in partnership together, and as joint traders, were persons residing, trading and using commerce beyond the seas, viz. at Dunkirk, in the kingdom of France, and the said C. D. (the now defendant) and one L. L. and one J. L. were persons residing, trading, and using commerce in parts beyond the seas, (to wit) at Dunkirk aforesaid, and one E. C. and P. A. were persons residing, trading, and using commerce within the kingdom, to wit, at London aforesaid; and they being so residing, trading, and using commerce; the said W. J. and J. F. (the drawers) who were so in partnership together, and residing in parts beyond the seas as aforesaid, on the — day of — in the year —— in parts beyond the seas, that is to say, at Dunkirk aforesaid, according to the aforesaid custom, made their certain Bill of Exchange in writing, the tenor of one of them being thereunto subscribed, on their joint partnership account, and in their joint names, stile, and firm, (to wit) W. J. and Co. being thereunto subscribed, bearing date the same day and year aforesaid, and then and there directed the said bill to the said C. D. (the now defendant) by the name of Mr. C. D. at London, and thereby requested the said C. D. at two usances, to pay that the first Bill of Exchange to the order of the said L. L. and J. L. by the names and description of Messrs. L. L. and Co. 100l. sterling value of the same, and to place the same as per advice from the said W. J. and Co. and then and there delivered the said bill to the said L. L. and J. L. or their order, and the said L. L. and J. L. afterward, and before the time appointed by the said bill for the payment thereof, viz. at Dunkirk aforesaid, in parts beyond the seas, indorsed the said bill according to the said custom, the hand of one of them on their joint account, in their copartnership name, stile, and firm, to wit, L. L. and

rested, which could not have been the case had an express promise been added to the count on the custom, because it is an established rule in pleading, that wherever the same plea may be pleaded, and the same judgment given on different counts, they may be joined in the same declaration. 1 Term. Rep. 276.

Co. being thereunto subscribed, and by that indorsement, the said L. L. and J. L. appointed the contents of the said bill to be paid to the said E. C. and P. A. by the name of E. C. and Co. or order, and then and there delivered the said bill indorsed to the said E. C. and P. A. and which said bill he the said C. D. (the defendant) afterwards, to wit, on —— at —— on sight thereof accepted, according to the said custom, and the said E. C. and P. A. (the indorsees) afterwards and before the payment of the said sum of money mentioned in the said bill, or of any part thereof, namely, on —— being the day on which the said bill became payable, and ought to have been paid by the said C. D. according to the tenor and effect of the said bill, and of the said acceptance, and indorsement thereof at —— caused the said bill so indorsed and accepted as aforesaid to be shewn and presented for payment, and the said C. D. was then and there requested to pay the said indorsees the said sum of money mentioned in the said bill, according to the tenor and effect of the said bill and of the said acceptance, and indorsement thereof, but the said C. D. did not then or at any other time pay the same, but then and there refused and neglected so to do; whereupon the said E. C. and P. A. (the indorsees) afterwards, to wit, on —— at —— caused the said bill to be protested for non-payment thereof, according to the said custom, and thereupon the said A. B. (the plaintiff) afterwards, to wit, on —— at —— upon the said protest, and according to the said custom for the honour of the said W. J. one of the drawers of the said bill, paid to the said E. C. and P. A. the said sum of money mentioned in the said bill, for the said bill; retaining the others, the drawer and acceptor of the said bill, and all others concerned or obliged to him in due form of law, according to the said custom, of all which said premises the said C. D. (the defendant) then and there had notice, and by reason of the said premises, and according to the said custom, the said defendant became liable to pay to the said A. B. (the plaintiff) the said sum of money mentioned in the said bill, and so paid by the said A. B. to the said E. C. and P. A. for the said bill, &c.

Then follows an averment of what two usances are.

Vid. ante page 38. Tatlock v. Harris. 3 Term. Rep. 174.

INSTEAD of bringing an action on the cuſtom or on the ſtatute, the plaintiff may in many caſes uſe a bill or note only as evidence in another action; and where the inſtrument wants ſome of the requiſites to form a good bill or note the only uſe he can make of it, is to give it in evidence; or if the count on the inſtrument be defective, he may give in evidence, in ſupport of ſome of the other counts for money had and received, or money lent and advanced, according to the circumſtances of the tranſaction.

Vid. Grant v. Vaughan. 3 Bur. 1516.

A BILL is preſumptive evidence of money lent by the payee to the drawer, and a note of money lent by the payee to the maker, and both conſequently of money had and received to the uſe of the holder, whether they be payable to the bearer, or to the order of the payee.

Vid. 3 Term. Rep. 183.

Vid. ante page 60.

HE, who transfers a bill or note without indorſement, gives no additional credit to the inſtrument, and therefore he cannot be ſued on the inſtrument itſelf, nor is liable to anſwer any ſpecies of action to any holder but him, to whom he immediately transferred it, and to him only for the conſideration on which it was given, whether for work and labour, goods ſold and delivered, money lent and advanced, or any other legal conſideration.

Vid. Chamberlyn v. Delarive. 2 Will. 353.

BUT if the party who took the Bill or Note did not uſe due diligence to obtain payment from the acceptor or maker, nor give due notice of their default to the party from whom he received it; the latter may either plead, or give in evidence the Bill or Note, to an action on the original conſideration.

Vid. ante page 70, 72.

THE holder of the Bill or Note may ſue all the parties who are liable to pay the money, either at the ſame time, or in ſucceſſion, and he may recover judgment againſt all, if ſatisfaction be not made by the payment of the money before judgment obtained againſt all; and proceedings will not be ſtaid in any one action but on payment of the debt and coſts in that action, and the coſts in all the others in which he has not obtained judgment.

Vid. Golding v. Grace. 2 Bl. Rep. 749.

2 Veſey, 115.

BUT though he may have judgment againſt all, yet he can recover but one ſatisfaction; yet though he be paid by

he may ſue out execution for the coſts in the ſeveral actions againſt the others.

AND if he have recovered judgment in more than one action, a tender of the principal recovered in one, and the coſts in all the reſt, will prevent him from taking out execution; and it will be conſidered as a contempt of the court, if he take out execution againſt more than one. Windham v. Wither. Idem v. Trull. 1 Str. 515.

THE plea generally pleaded to this action, is that of non-aſſumpſit: but the defendant may, if the truth will warrant him, plead non-aſſumpſit infra ſex annos; for by ſtatute 21 Jac. I. c. 16. actions on the caſe, except upon *accounts* between merchants, muſt be brought within ſix years: and by the expreſs proviſion of the ſtatute of Queen Ann, all actions of Promiſſory Notes muſt be brought within the ſame time as is limited by the ſtatute of James, with reſpect to actions on the caſe. S. 2.

BUT an acknowledgment of the debt, or a promiſe to pay made within ſix years of the commencement of the action, will take the caſe out of the ſtatute.

To an action on the caſe on a Bill of Exchange againſt the defendant as acceptor, he pleaded, that after acceptance, he gave a bond in diſcharge of it; it was held that this plea was bad, becauſe it amounted to the general iſſue, for the debt on the bill being extinguiſhed by the bond, the defendant ought to have pleaded non-aſſumpſit, and to have given the bond in evidence. 8 W. 3. M. 5 Mod. 314.

If any of the parties whoſe names appear on the Bill or Note become bankrupt, the holder may come in under the commiſſion; and if he have received no part of the money from any of the others, may be admitted to prove the whole ſum mentioned, and receive a dividend on the whole. 2 P. Will. 89, 407. 1 Atk. 107.

If afterwards any of the others become bankrupt, he may prove the remaining ſum, and receive a dividend on that.

If all become bankrupt, before the holder has received any part of his debt, he may prove the whole ſum under each commiſſion; and though he afterwards receive a dividend under one, his dividend under a ſecond ſhall be calculated according to the whole ſum originally proved, not on what remains due 1 Atk. 110. 2 Veſ. 114, 115.

after deducting the ſum received under the firſt commiſſion; but what he had received on the firſt ſhall be deducted from the dividend on the ſecond; ſo under the third, his dividend ſhall be calculated according to the whole ſum proved, but from the dividend ſo calculated, ſhall be deducted the amount of the money he has received under the other two; and the ſame rule ſhall be obſerved in every ſubſequent caſe, till he ſhall have received on the whole twenty ſhillings in the pound.

1 Atk. 75, 344. THE general rule with reſpect to debts carrying intereſt in caſe of a bankruptcy, is that all intereſt ceaſes from the date of the commiſſion; but if there be an eſtate ſufficient to pay twenty ſhillings in the pound, and a ſurplus, intereſt ſhall then revive, and be paid up to the final diſcharge of the debt.

Vid. Chiſton v. Wiffen & Cromwell. 3 Wilſ. 13. IF a man accept a bill without conſideration, and the drawees after negociating it become bankrupts, and the holder, inſtead of coming in under the commiſſion, chooſe to reſort to the acceptor for the whole ſum, which he pays after the bankrupty, this is ſuch a debt as the acceptor cannot prove under the commiſſion, and he may therefore recover again the drawers, notwithſtanding their certificate.

CAP. IX.

Of the Proof neceſſary at the Trial, and of the Defence that may be ſet up there.

A GREAT part of what may be ſaid under this head neceſſarily riſes out of the general doctrine explained in the preceding chapters, and will therefore in ſubſtance be little more than a repetition, though different in form.

THE plaintiff muſt in all caſes prove ſo much of what is neceſſary to intitle him to his action, and of what muſt

ſtated in his declaration, as is not from the nature of the thing and the ſituation of the parties neceſſarily admitted.

In an action againſt the acceptor, it is a general rule that the drawer's hand is admitted, becauſe the acceptor is ſuppoſed to be acquainted with the writing of his correſpondent, and by his acceptance he holds out, to every one who ſhall afterwards be the holder, that the bill is truly drawn: it has indeed been lately ſuggeſted from high authority, that this rule has probably not been eſtabliſhed on the moſt mature conſideration, and that if it ſhould ever come to be the ſubject of future diſcuſſion, there might be ſome reaſon to alter it; caſes, it was ſaid, might be imagined, where the knowledge of the drawer's hand might more naturally be ſuppoſed in other parties than in the drawee: that the payee generally received the bill from the drawer, who was his correſpondent, and that therefore the preſumption was, that he knew as well as the acceptor, or perhaps better, whether the bill was in fact drawn by the perſon by whom, on the face of it, it imported to be drawn, and that from the privity between them, the ſame knowledge might be imputed to his aſſignee.—But theſe obſervations ſeem by no means ſatisfactory. By accepting a bill, the drawee evidently ſhews, that he has no doubt of its being in the hand of the perſon appearing as the drawer; he may have had advice of an intention to draw upon him; he may have effects of the drawer in his hands, or he has ſome good reaſon for honouring his bills; the payee, on the contrary, may in many caſes be entirely unknown to the drawer; the bill may have been remitted to him by a correſpondent, whoſe name does not appear upon it; or if, in fact, the remitter be the payee, who of courſe knows the drawer's hand, he cannot, along with the bill, tranſmit that knowledge to the indorſee, who is the perſon that has it preſented for acceptance; much leſs can any of the ſubſequent holders be ſuppoſed to have any knowledge of the hand of the drawer; it would therefore be productive of much inconvenience, if in an action againſt the acceptor, the plaintiff were to be held to the proof of the drawer's hand: on the event of the bill's not being really drawn by the perſon

1 Ld. Raym. 444. Jenys v. Fowler. Str. 946. Price v. Neal. 3 Bur. 1354. 1 Bl. 390.

whose name appears upon it as the drawer, the true question is, *to whom*, is negligence or want of caution to be imputed? to the *holder?* who in most cases, if he has any knowledge of the drawer's hand, has that knowledge from accident, and not from the nature of the transaction? or to the *acceptor*, who by his acceptance, impliedly tells the person presenting it, that he undertakes for the bill's being a true one? To the *acceptor* certainly. And therefore if the bill be in fact forged, 'tis he who must sustain the loss.

Vid. Price v. Neale. 3 Bur. 1354.

In an action against the acceptor therefore, where the acceptance was on sight of the bill, whether in writing on the bill or by parol, it is not necessary to prove the hand writing of the drawer. But if the acceptance was without sight of the bill, the acceptor is not precluded from disputing the hand of the drawer; if in truth, the hand writing of the latter was forged, the acceptor could not set off, in account with him, the money paid on that bill; and as he did not see the bill at the time of acceptance, he has not entered impliedly into any engagement, that the very bill on which the suit is founded, was drawn by his correspondent, and consequently no negligence can be imputed to him, in not having taken due precaution to be satisfied that the bill was in the hand writing of the drawer: in such a case therefore, it is necessary that in an action against the acceptor, the signature of the drawer should be proved: that of the acceptor himself must of course be proved, and that of every person through whom the plaintiff, from the nature of the transaction, must necessarily derive his title.

Vid. page 48.

On a bill payable to bearer, there is no person through whom the holder derives his title; in an action against the acceptor therefore, he has only to prove the hand writing of the acceptor himself.

Vid. page 58, 59.

But to a bill payable to order, the holder can have no title, unless the payee have actually expressed his order by indorsement. The engagement of the acceptor is not to pay to every one who shall happen to be the bearer, but to those only who shall be entitled by the order of the payee: It has therefore long been a general rule, that in an action against

the acceptor of a bill payable to order, the plaintiff muſt prove the hand writing of the payee or firſt indorſor: if his indorſement be ſpecial to "another perſon," or to "another, "or his order," the ſame rule, on the ſame principle, applies to the indorſement of that other perſon, as it does to the indorſement ſpecifically made of every ſubſequent indorſor, between the payee and the plaintiff. If the indorſement of the payee be general, the proof of his hand-writing is ſufficient; that of any other of the indorſors is not requiſite, though all the ſubſequent indorſements be ſtated in the declaration; for by indorſing generally, the payee has ſhewn his order to be that the bill ſhould be payable to any ſubſequent holder; and accordingly it has been ſhewn that any ſuch ſubſequent holder, may declare as the indorſee of the firſt indorſor, or of that indorſor who firſt indorſes in blank: but in this caſe, in order to render the evidence correſpondent to the declaration, all the ſubſequent names muſt be ſtruck out, either at the time of the trial or before.

Vid. page 59.

BUT the plaintiff, in the caſe of a transfer by delivery, which may be either when a bill is payable to bearer, or when a bill payable to order is indorſed blank, may be called upon to prove that he gave a good conſideration for it, without the knowledge of its having been ſtolen, or of any of the names of the blank indorſors having been forged.

Vid. ante 58, 59.

Miller v. Race. 1 Bur. 452. Peacock v. Rhodes. Doug. 633.

NOTWITHSTANDING this general rule, that, in an action againſt an acceptor of a bill payable to order, the hand writing of the firſt indorſor muſt be proved at the trial, a caſe is reported where it is ſaid to have been held, that ſuch proof is not *always* neceſſary: by the report it appears, that it was proved that the defendant had accepted the bill; that there was no *actual* proof, that the name of *one* of the indorſors was of his hand writing; that the name of *that* indorſor and thoſe of all the other indorſors was upon the bill at the time of the acceptance, and *that at that time the defendant promiſed to pay the bill:* this evidence was left to the jury, who found a verdict for the plaintiff.—The queſtion being agitated, whether upon this evidence the matter ought to have been left to the jury, the court held that it ought, and are reported to have

Hankey v. Wilſon. Sayer 223.

expreſſed themſelves thus. "It is in general neceſſary to giv
"actual proof, that the name of every indorſor is of his hand
"writing; but it is not neceſſary to do this in every caſe: i
"the preſent it was a matter proper for the determination
"the jury, whether the acceptance of the bill, when the name
"of all the indorſors were upon it, *together with the pr*
"*miſe of the defendant to pay it*, did not amount to an *a*
"*miſſion*, that the name of *every* indorſor is of his hand
"writing, that admiſſion ſuperſeding the neceſſity of actu
"proof."

BUT the authority of this caſe appears to be very doubtfu
unleſs all the indorſements were ſpecial, which they are n
ſtated to have been, the general rule as laid down by the cou
extends too far, the report, therefore, is at leaſt inaccurat
It is difficult to conceive how a promiſe to pay the bill, mad
at the time of the acceptance, can be conſidered as an a
miſſion of the hand-writing of the indorſors; and it has bee
lately decided that ſuch admiſſion is not to be preſumed fro
the circumſtance of the indorſements being on the bill at th
time of the acceptance. The acceptor only looks on the fac
of the bill which purports to be in the hand-writing of th
drawer, which he is therefore precluded from afterwards di
puting; he never looks, or at leaſt is not ſuppoſed to look,
the back of the bill; and if he did, he cannot be preſume
to admit the hand-writing of the indorſors, becauſe his privit
is not with them; it is only with the drawer.

Smith v. Cheſter. 1. Term Rep. 654.

WHERE the acceptance is conditional, the event on whic
the condition depends muſt be proved to have taken pla
before the commencement of the action.

Vid. ante page 52.

IN an action by an indorſee againſt the drawer, the ſam
rules obtain with reſpect to proof of the hand-writing of th
indorſors, as in an action againſt the acceptor.

Vid. Collins v. Emett. Bl. Term. Rep. 313.

THAT of the drawer himſelf muſt of courſe be proved:
muſt alſo be proved, that the plaintiff has purſued that di
gence with reſpect to the drawee, and given ſuch notice
the drawer, of the default of the former, as are ſhewn in
former chapter, to be neceſſary on his part to intitle him
have recourſe to the latter.

Vid. page 76.

Fro

FROM the rule that in an action againſt the drawer or acceptor of a bill payable to order, there muſt be proof of the ſignature of the firſt indorſor, and of all thoſe to whom an indorſement has been ſpecially made, has ariſen the queſtion which has ſo long agitated the commercial world on the ſubject of indorſements, in the name of fictitious payees.

A BILL payable to the order of a fictitious perſon, and indorſed in the fictitious name, is not a novelty among merchants and traders. A caſe of that kind appears to have been brought to trial upwards of twenty years ago. It was an action by the indorſee againſt the acceptor of a bill of exchange, payable to Butler and Co. and their order, and indorſed in that name. The plaintiff was ſo far from proving it to have been indorſed by any perſons uſing that firm, that his own witneſſes ſaid, they believed it was indorſed by Cox the drawer. It alſo appeared, that there was a houſe of Butler and Co. with whom Cox had dealings, but it was proved that the bill in queſtion had never been in their hands; it was admitted that the bill was a true one, and that the defendant had regularly accepted it; it appeared further, that the acceptor had *expreſsly promiſed to pay*, at the time the holder had diſcounted the bill; but it was inſiſted, that the indorſement being fictitious, the plaintiff had failed in making out an eſſential part of his title. Lord Mansfield obſerved, that the intent of the bill was only to enable Cox to raiſe money, and the reaſon why it was not made payable to his order, was, that there were other bills at that time payable to his order, and if this had been ſo too, there would have been too many in the ſame name in circulation at the ſame time, which would have had the appearance of fictitious credit; that names were often uſed of perſons who never exiſted: the defendant, by his acceptance, *and promiſing expreſsly to pay the bill*, had enabled Cox to put it in circulation, and having ſo done, he ſhould not avail himſelf of an objection that the plaintiff had not completely made out his title.

Stone v. Freeland. B. R. Sittings at Guildhall, after Eaſter Term, 1769.

1 Term. Rep. 176.

BUT in the years 1786, 1787, and 1788, two or three houſes, connected together in trade, entering into engagements far beyond their capital, and apprehending that the credit of their own names would not be ſufficient to procure currency

currency to their bills, adopted, in a very extenſive degre
a practice, which before had been found convenient on
ſmaller ſcale.—So long as the acceptors or drawers could e
ther procure money to anſwer their bills, or had cred
enough with the holder to have them renewed, the ſubject
theſe fictitious indorſements never came in queſtion. B
when the parties could no longer ſupport their credit, and
commiſſion of bankruptcy became neceſſary, the other cr
ditors felt it their intereſt to reſiſt the claims of the holders
theſe bills, and inſiſted that they ſhould not be admitted to pro
their debts, becauſe they could not comply with the gener
rule of law, which requires proof of the hand-writing of t
firſt indorſor. The queſtion came before the Lord Chance
lor by petition: He directed trials at law, and ſeveral ha
been had; three againſt the acceptor in the King's Benc
and one againſt the drawer in the Common Pleas; thou
not all expreſsly by that direction.

Tatlock v. Harris. 3 Term. Rep. 174.

IN the firſt caſe againſt the acceptor, beſides the gener
counts for money *paid* by the plaintiffs to the defendant's u
and *money had and received* by the defendant to the plaintif
uſe, there were alſo two ſpecial counts laid on the bill i
ſelf: The firſt was in the terms of the bill, "that the d
"fendant and others drew a Bill of Exchange on the defe
"ant, payable to *Grigſon and Co.* or order, three mont
"after date, which the defendant accepted; and that Gri
"ſon and Co. indorſed it to Lewis and Potter, who indor
"it to the plaintiffs." The ſecond count ſtated it to be "
"bill drawn as above in favour of certain perſons trading u
"der the firm of Lewis and Potter, or order, and indor
"by Lewis and Potter to the plaintiffs."

THE circumſtances proved at the trial were theſe:

THAT there was a houſe of trade at Nottingham under
firm of Harris, Harris, and Plant, of which the defend
was one of the partners, and that the defendant *alone* carr
on buſineſs in Wood-ſtreet, and reſided in London; t
the body of the bill, as well as the ſignatures of the draw
and acceptor, were in the hand-writing of the defendan
that no ſuch houſe of trade as that of Grigſon and Co.
concern

oncerned in the tranſaction, but that the defendant had rawn the bill payable to Griſon and Co. at the requeſt of ewis and Potter; that the indorſement in the names of Grigon and Co. was fictitious, and that before the bill became ue, the defendant knew that to be the caſe, but it did not preſsly appear whether he knew it at the time the bill was rawn; that the indorſement of Lewis and Potter was in the and-writing of one of the partners of that houſe, and that ey received the bill from the defendant and delivered it to e plaintiffs: that the value of the bill was paid to the houſe Lewis and Potter in draughts on bankers, which were afrwards paid in caſh; and that the defendant had credit gien him in account with the houſe of Lewis and Potter for e value of the bill.

To this evidence, the defendant's counſel demurred, as t ſupporting any count in the declaration.

Lord Kenyon, in giving the opinion of the court, ſaid, that deciding on this particular caſe, they did not wiſh to have underſtood that they meant to infringe on the rule as apicable to caſes in general; for that generally ſpeaking ere was no doubt but the indorſee of a Bill of Exchange, yble to order, muſt, in deriving his title, prove the handiting of the firſt indorſor. But that this deciſion proceedon the ſpecial circumſtances of this particular caſe, that defendant, at the time of entering into this engagement, ew that there were no ſuch perſons as Grigſon and Co. d therefore that in point of formal derivation of title, that ich is uſually done could not be done in this caſe. That, the firſt count of this declaration, the opinion of the court not proceed, neither was it neceſſary to ſay any thing on ſecond; though if it had been neceſſary to reſort to that, himſelf had an opinion on it. But the counts on which judgment of the court was given, were thoſe for *money* d, and *money had and received*. In Lord Raymond's time d been decided, that a general *indebitatus aſſumpſit* might maintained to recover money for the value of a Bill of change which was not paid. That caſe, indeed, had on a bill payble to bearer, but the doctrine of that caſe

Ld. Kenyon.

Ward v. Evans, 2 Ld. Raymond, 930.

Grant v. Vaughan.

case was a sufficient foundation for the opinion of the co
in the present, and had been recognized in a subsequent c
by each of the judges of this court, "That to give such
"bill is, as it were, an assignment of so much proper
"which becomes money had and received, to the use of
"holder of the bill." Here the defendant, being a debtor
the house of Lewis and Potter, drew a bill, which he deliv
ed to them, and drew it in terms which could not be pro
in a formal manner: He was not only privy to the trans
tion, but the very negociator of it; and by drawing it,
put himself in a *situation* to pay, what he was in conscien
bound to pay; therefore it was an *appropriation* of so mu
money to be paid to the person who should become the ho
er of the bill.

Vere v. Lewis. 3 Term. Rep. 183.

In the next case, the first count stated the Bill of Excha
to be drawn by Livesay and Co. on the defendants, in fav
of Lawrence Ashworth, who was also a fictitious person,
by him indorsed to the plaintiffs. The second count st
the bill to be payable to the *bearer*; the third payable to
order of the drawers, and indorsed by them to the plaint
then followed the money counts.

An attempt was made on behalf of the defendants, to
tinguish this case from the former, because there was no
dence that in point of fact they received any value for the
and that therefore they could not be liable on the *money* coun
But the court said, that the acceptance of the defendants
alone evidence that they had received value from the draw
and that on the demurrer to evidence, the court might d
the same inference which would have been drawn by the ju
Three of the court also *thought*, that the plaintiffs might
cover on the second count, which stated the bill as drawn p
able to *bearer*.

L.d. Kenyon C. J. Ashhurst J. and Buller J.

Miner v. Gibson. 3 Term. Rep. 483.

The next case against the acceptor having also a coun
which the bill was stated to be drawn payable to bearer,
the court being of opinion that it was decided by the
gave judgment for the plaintiff without hearing any a
ment, and added, they understood it had been agreed to
it into the shape of a special verdict, that it might be ca
up to the House of Lords.

On the authority of these two last cases against the acceptor in the King's Bench, was decided the case against the drawer in the Common Pleas, the circumstances of which are stated at full length in the last chapter, judgment being given for the plaintiff on the count which stated the bill as being drawn payable to bearer.

Collins v. Emett. Bl. Term. Rep. C. B. 313.

The case of Minet and Gibson has been argued before the House of Lords, and now waits the opinion of the judges.—The circumstances stated in the special verdict are these:

Livesay and Co. made a certain instrument in writing, directed to the defendants, requiring them, three months after date, to pay to J. White, or order, 721l. 5s.; Livesay and Co. knew, at the time of making it, that no such person existed as J. White, mentioned in the bill; an indorsement in writing was afterwards made by Livesay and Co. purporting to be the indorsement of J. White, and requiring the contents of the bill to be paid to Livesay and Co. or their order: Livesay and Co. afterwards indorsed (by A. Goodrich, by procuration of Livesay and Co.) to the plaintiffs for a full and valuable consideration, when the plaintiffs became the holders of the bill; the defendants afterwards accepted, with the full knowledge that no such person as J. White, mentioned in the bill, existed, and that the name of J. White, so indorsed thereon, was not in the hand-writing of any person of that name. The defendants at the time of making and accepting the bill had not, nor had they at any time since, any money, goods, or effects, of or belonging to Livesay and Co. or of the plaintiffs, in their hands.

Beside the money counts, the declaration contained seven special counts on the bill.—The first stated that Livesay and Co. made a Bill of Exchange, directed to the defendants, requiring them, three months after date, to pay 721l. 5s. to John White, or order; Livesay and Co. well knowing that no such person as J. White existed; on which bill an indorsement was made, purporting to be the indorsement of J. White named in the bill, requiring the contents to be paid to Livesay and Co. or order; that Livesay and Co. (by one Absolom Goodrich, by procuration of Livesay and Co.) indorsed

dorsed to the plaintiffs; and that the defendants accepted
knowing that no such person as J. White existed, and th
the name of J. White so indorsed was not the hand-writi
of any person by that name.

THE second count, after stating the drawing of the bill as incl
first, proceeded thus; Livesay and Co. knowing that J. Whi
was not a person dealing with, or known to Livesay and C
and using the name of J. White on the bill as a *nomin*
person only, and intending not to deliver the same to hi
or to procure the same to be actually indorsed by him; o
which bill a certain indorsement was made, requiring th
payment to be made to Livesay and Co.; and that Livesa
and Co. indorsed to the plaintiffs, without having deliver
the bill to J. White, and without any actual indorsement o
assignment of the bill by White.

THE third count stated, that the bill was made payable
themselves, Livesay and Co. by the name and description
J. White.

THE fourth treated it as a common bill, payable
J. White, or order, and stated that J. White indorsed
to the plaintiffs.

THE fifth as payable to *bearer*; and that the plaintiffs wer
the bearers.

THE sixth payable to J. White, or order; with an aver
ment that, when the bill was made, there was no such perso
as J. White, the supposed payee, but that the name wa
merely fictitious; by reason whereof the sum mentioned i
the bill became and was payable to the bearer thereof, ac
cording to the effect and meaning of the bill; averring also
that the plaintiffs were the bearers and proprietors thereof.

THE seventh count stated, that there was a partnership, c
house, of certain persons using trade, as well in the name an
firm of Livesay and Co. as in the name and firm of J. White
that the last-mentioned persons made a certain other bill, (th
hand of one of them on their joint account, and in their copar
nership name and firm of Livesay and Co. being thereto sub
scribed) and directed it to the defendants, requiring them
three months after date, to pay to the said last mentioned copart
ner

rs, by the name of J. White, or order, 721l. 5s.; and
at the ſaid laſt-mentioned copartners afterwards, by a
rtain indorſement in writing, appointed the contents to be
id to the plaintiffs, and delivered the bill, ſo indorſed, to
em.

ONE obſervation naturally preſents itſelf to the mind on the
ſpection of this record: The two firſt counts ſtate in ſub-
nce all the circumſtances found by the ſpecial verdict, yet
dgment was given for the plaintiffs, not on one of theſe, but
the fifth count, which ſtates the bill as payable to bearer:
appears ſingular, that a court of juſtice ſhould decide, that
man ſhould have a right to recover on a general count,
pported by ſpecial circumſtances given in evidence, and
at theſe very circumſtances, when ſtated ſpecially on the
cord, ſhould not be conſidered as ſufficient to ſuſtain the ac-
on.—It ſeems impoſſible to account for this apparent incon-
ſtency in any other way than by adverting to the declaration
the caſe of Vere and Lewis, and the judgment given upon
; in that, there is no count which ſtates the circumſtances
ecially; but the court being of opinion that the plaintiff
as entitled to recover, thought the count which ſtated the
ll as payable to bearer, was a ſufficient foundation for their
dgment; and a like count appearing in the caſe of Minet
d Gibſon, they gave judgment on that, without adverting
the two counts, which ſtated the ſpecial circumſtances of
e caſe.

THIS inconſiſtency being pointed out by the counſel for
e plaintiff in error, in the Houſe of Lords, as one ground
impeaching the judgment of the court below, it was ob-
rved in anſwer, that there being in fact but one cauſe of ac-
on, the plaintiff could have judgment only on one count, and
conſequently judgment was neceſſarily entered for the defend-
t on all the reſt; and if upon the whole record there ap-
ared a ſufficient cauſe of action, but the judgment was
tered on the wrong count, the court of error would rec-
y it.

INDEPENDENTLY of the rule which requires the proof of
e hand-writing of the firſt indorſor, one preliminary objec-

tion

tion has been made to the holder's right of recovery in a form of action againſt the drawer or acceptor: The very of indorſing on a bill, a name which belongs to nobody, it is ſaid, in itſelf a felony; it has a general tendency to fraud, though the fraud be pointed againſt no particu individual; and in all the caſes which have ariſen, has ac ally defrauded the holder of the bill, by impoſing on h the idea of a ſecurity which does not exiſt. The act too, ſending the bill into circulation with a fictitious name on it is ſaid, is a felony in him who is privy to the tranſaction.

WHETHER each or either of theſe acts be in reality a lony, admits of conſiderable doubt, and is one point on whi the opinion of the judges is required by the Houſe of Lor Should that opinion be given in the affirmative, the adv cates on the part of the defendant to the action inſiſted, t the holder of the bill could not recover againſt either the draw or the acceptor, becauſe he could not make title, throu the medium of a felony in another; a felony contaminate tranſaction, and the civil remedy is completely merged in by the policy of the law, to prevent, as much as poſſib crimes from going unpuniſhed. The caſe of Peacock Rhodes, they ſaid, could not be cited in oppoſition to t doctrine; for in that caſe the bill having been regularly dorſed by the payee, and having, though after having b ſtolen, come to the hands of the plaintiff for a good conſi ration, he was only under the neceſſity of proving the ha writing of the firſt indorſor, and was bound to make no p of his title through the perſon who ſtole the bill: but here plaintiff deriving his title through the indorſement, wh was a forgery, was neceſſarily barred of his action. To t it was anſwered, that this propoſition with reſpect to the fect of the felony was not true to ſuch an extent; it was t indeed, that a civil action could not be maintained, where cauſe of action was grounded wholly on an act of felony; if one ſtole a horſe or money, the owner could not maint trover, or money had and received againſt him, becauſe civil remedy was merged in the felony: if the horſe came to the hands of another perſon, under circumſtances wh

Vid. 3 Term. Rep. 176. Bl. Term. Rep. C. B. 319.

Doug. 611.

wo

would not amount to a change of property, the original owner might recover him from that perſon; though therefore the felony might be an anſwer to an action againſt either the drawer or acceptor, where it appeared the defendant was guilty of the felony, yet that would not preclude the plaintiff from recovering againſt the other, if he did not appear to be guilty.

The advocates on the other ſide of the queſtion in the Houſe of Lords, profeſſing not to impeach the judgment of the Common Pleas, in the caſe of Collins and Emett, in which the defendant was perfectly innocent of the ſuppoſed felony, were ſatisfied to maintain, that where the fact of the felony could be fixed on the defendant, that was a bar to a civil action.

In a tranſaction of this kind, it is apprehended, that, whoever in fact makes the fictitious indorſement, both the drawer and acceptor muſt in general be guilty of publiſhing the bill with that indorſement on it, knowing it to be fictitious.

In ſuch a caſe, whether this amounts to a felony, is certainly a preliminary queſtion; for though independently of that queſtion, the plaintiff might be entitled to recover, yet in fact, it ſhall be decided to be felony, he muſt neceſſarily be precluded from his action, becauſe if he were to recover all, he muſt recover againſt the felon himſelf.

But it may happen that the acceptor may not know that the bill he accepts, is attended by any circumſtance different from thoſe attending Bills in the uſual courſe of buſineſs; as where the bill is brought him for acceptance by a third perſon either before the indorſement is made or afterwards, without intimation of the payee's being fictitious: The drawer too, even in *common* caſes, may be ſo far unaffected with the felony, that he may not be guilty of publiſhing the bill with a falſe indorſement on it, knowing it to be falſe, for it may be carried out of his hands before the indorſement is made: and in ſome ceſes, as in that of Collins and Emett, the perſon appearing as the drawer may be perfectly ignorant of the tranſaction.

In any of these cases therefore, in which the defendant m
appear to have acted without knowledge of the circumstanc
the question of felony cannot be considered as preliminary
the decision on the plaintiff's right of action: If the adhere
to the rule which requires proof of the hand-writing of
first indorsor, be so rigid, that the plaintiff can in *no* form
action recover without it, that is, of itself sufficient with
the intervention of the felony: If an action in *any* form
be sustained, in which that rule may be dispensed with, t
it is not through the felony that the plaintiff derives his ti
and consequently he cannot be affected by the decision of
question.

If this reasoning be well founded, it follows that whate
that decision may be, the *general* question is still open to
cussion; if in the affirmative, then in those cases only wh
the defendant is innocent; if in the negative, then in
cases.

In support of the judgment on the fifth count, which st
the bill as being drawn payable to bearer, it had been u
that in stating an agreement or a deed in pleading, it is su
cient to state the legal operation of it, though there might
a verbal variance between that and the instrument itself:

Co. Lit. 45, a

where a lease is made jointly by B. tenant, for life of C.
him in remainder or reversion in fee; during the life o
this may be stated as the lease of tenant for life, and the c
firmation of him in remainder or reversion, that being
the legal operation of the deed; and, for the same reason,
ter the death of C. it may be stated as the lease of the pe
in remainder or reversion, and the confirmation of B.

Bl. Term. Rep. C. B. 321.

So here, it was said, though the bill appeared on the
of it, to be payable to order, yet as nobody existed who c
give such order, the engagement must be to pay the
which was, in effect, to render it payable to the bearer.

If, however, recourse must be had to the intention o
parties, it would seem that it is only in the case of a
indorsement in the name of the fictitious payee, that the
must be considered as in effect payable to bearer; when
indorsement is *special*, as it was in the present case, the i
tion to be attributed to the parties is, that it should be

able to the order of him to whoſe order it is made payable by the fictitious indorſement, and then the third count would have been better adapted to ſupport the judgment than the fifth.

But it was objected that this argument was not applicable to the preſent caſe; for though it muſt be admitted that a deed muſt be ſtated according to its legal operation; yet that operation muſt appear on the face of the deed itſelf, without any collateral circumſtances to explain it, *contrary* to the evident meaning of the words.

With reſpect to the joint leaſe of tenant for life, and him in remainder or reverſion, if the ſeveral intereſts which they had in the land did not appear in the deed, yet the operative words of the leaſe were not of that fixed and determinate meaning that they could not admit of a different conſtruction, if collateral circumſtances required it, in order to give them effect: But the words "payable to order" and "payable to bearer" were ſo peculiarly appropriated to the diſtinct ſpecies of bills in which they were reſpectively uſed, that the one could by no poſſibility be conſtrued to mean the other.

A still ſtronger objection to the judgment's being ſupported on this count, ariſes from a queſtion put to the counſel by the Lord Chancellor, "whether an action could be maintained on this bill againſt an indorſor?" That an action may be maintained againſt an indorſor of ſuch a bill can admit of no doubt: It is from the frame of it payable to order, and transferable by indorſement; and in an action againſt the indorſor, no queſtion could ariſe about the fictitious payee, becauſe, as will be ſeen hereafter, in that action the plaintiff derives no part of his title, through any of the parties to the bill who precede the defendant: But a bill payable to bearer, being transferable by delivery, cannot regularly be indorſed; and it ſeems, from the queſtion, to have been ſuppoſed that no action could be maintained againſt the indorſor; though no doubt was entertained but that it might, even when it was held that a bill payable to bearer could not be the ſubject of an action by the indorſee, againſt the acceptor or drawer. If, therefore, the judgment were

affirmed on this count, it would follow that the ſame inſtru
ment muſt, in one caſe, be conſidered as a bill payable
bearer, and in another as a bill payable to order, both
which it cannot be: But the difficulty ſuggeſted with reſpe
to the period when the bill ſhall be ſaid to ceaſe to opera
as payable to bearer, and aſſume the character of a bill pa
able to order, admits of an eaſy ſolution: As againſt t
drawer and acceptor it operates as the one; as againſt the i
dorſor, it operates as the other.

So general ſeems to be the opinion that there ought to
a ſtrict adherence to the rule which has given riſe to t
queſtion, that the count which ſtates the bill in its own ter
appears to have been abandoned on all ſides: The plainti
counſel in the caſe of Tatlock and Harris abandoned it;
advocates on the ſame ſide in the Houſe of Lords abando
it: The Court of King's Bench profeſſed, that on it t
opinion did not proceed; and the Lord Chancellor in his
dreſs to the Houſe on the ſubject of the queſtions to be
ferred for the opinion of the judges, ſeemed to think it c
not be ſupported by the ſpecial verdict.

One general objection was made to all thoſe counts w
were founded on the bill itſelf: It is only in favour o
cuſtom of merchants that the practice is founded of decla
on thoſe inſtruments as ſpecialties; and if ſuch a bill was
within the cuſtom of merchants, then the plaintiff could
recover on thoſe counts: That ſuch a bill was not w
the cuſtom of merchants, it was argued, appeared from
that in no book on the ſubject was there to be found an
luſion to a bill of this kind; the uſage had provided, an
law had acknowledged two ſorts of bills, which were
cient to anſwer every purpoſe of trade, where the partie
no ſiniſter views; if it was wiſhed to facilitate the circulat
the bill, it might be made payable to bearer; if to conf
within certain limits, it might be made payable to o
but this was a new invention to enable men to raiſe mon
a fraud, and it could not be pretended, that this was
the cuſtom of merchants.

To this it was anſwered, that the cuſtom of merch

not to be confined to those particulars which are to be found in any mercantile book; nor is the novelty of the thing a sufficient reason to reject it; it had not been all at once, that every thing which makes a part of the law and custom of merchants at this day, was established; it was not without considerable struggles that bills, payable to bearer, obtained the same privileges as those payable to order: new facts laid the foundation of new rules; and unless the decision on the question of felony could preclude all further discussion, there could be no inconvenience in its being determined now for the first time, that where a bill was drawn in the name of a fictitious payee, and accepted, the drawer and acceptor should, by the custom of merchants, be answerable for the money to a holder by a fair consideration.

That such a holder, in substantial justice, ought to recover against either the drawer or the acceptor, there can be no doubt: He has parted with his property, on the faith of their security; and it is not very gracious in them to tell him, that because, by their contrivance perhaps, he has one security less than he supposed, he shall not have the advantage of those which really exist.

Such is the substance of the arguments on both sides of this important cause, and as far as I can recollect, the points proposed for the opinion of the judges are these:

First, whether the publication of the bill by the defendant with the fictitious indorsement on it, he knowing at the time that it was fictitious, amounts to a felony?

Secondly, if that be not a felony, whether the facts found by the special verdict, support the judgment on the count, which states the bill as payable to bearer?

Thirdly, if judgment on that count cannot be supported, whether it can be supported by any other count founded on the bill as a specialty?

Fourthly, Whether on any of the other counts which state all the particular circumstances of the case, the plaintiff is entitled to recover?

It was also suggested by the Lord Chancellor, that if on the first point, the opinion of the judges should be in favour

of the defendant in error, and on the others againſt him, another queſtion might ſtill be conſidered, whether, when the defendant to the action was privy to the fraud, the plaintiff might not recover in an action of deceipt?

1 Ld. Raym. 174. Str. 444. 2 Bur. 675.

In an action by an indorſee againſt an indorſor, it is not neceſſary to prove either the hand of the drawer or of the acceptor, or of any indorſor before him againſt whom the action is brought; for by his indorſement, he virtually undertakes to every ſubſequent holder, that the names of the drawer, acceptor, and previous indorſors, are really in the handwriting of thoſe to whom they reſpectively purport to belong.

The ſame diligence alſo with reſpect to the drawee, and the ſame notice to the defendant as indorſee, muſt be proved in this action, as in that againſt the drawer, every indorſor being with reſpect to ſubſequent indorſees or holders a new drawer. But proof of a demand from the drawer, and notice of non-payment by him, is not neceſſary.

1 Ld. Raym. 743.

Where the action is by an indorſor who has paid the money, proof muſt be given of the payment.

Vid. Louviere v. Lanbray. 10 Mod. 36, 37. Symonds v. Parminſter. 1 Wilſ. 185.

In an action by the drawer againſt the acceptor, it is neceſſary to prove the hand-writing of the latter; demand of payment from him, and refuſal, the return of the bill, and payment by the plaintiff; but it does not appear neceſſary to prove, that the acceptor had in his hands, effects of the drawer; his acceptance is preſumption that he had, and if he had not, the proof muſt lie upon himſelf.

Vid. 3. Wilſ. 18.

In an action on the caſe by the acceptor againſt the drawer, the plaintiff muſt prove the hand-writing of the defendant, and payment of the money by himſelf, or ſomething equivalent to that, ſuch as his being in priſon in execution.

It does not ſeem clear, whether, in the caſe of a ſimple acceptance, the acceptor in this action muſt not be put to the proof that he had no effects of the drawer in his hands, either at the time of the acceptance, or at the payment of the bill; but the preſumption of law, being that he had effects, it would therefore ſeem that the proof of the contrary lies on him.

In the caſe however of an acceptance or payment under proteſt,

roteſt, there can be no doubt, but the proteſt is ſufficient
reſumptive evidence of no effects at the time when the pro-
t was made; if therefore it was made on payment, it is cer-
inly preſumptive evidence of no effects, and it lies on the
awer to ſhew the contrary: but if the proteſt was only at
e time of acceptance, it is natural to preſume that at the
ne of payment the acceptor had effects, and the proof that
had not muſt lie on him.

In actions againſt the drawer or indorſor, the proteſt is ſufficient evidence that the bill is not paid; and the mere production of the proteſt is ſufficient; it is not neceſſary to prove either the writing of the notary, or to give any account how the plaintiff had the proteſt; for that would be deſtructive to public commerce, and throw too great a difficulty on tranſactions of this kind: and beyond ſeas, it is ſaid, that it is ſufficient to ſhew the court the proteſt without producing the bill itſelf, but here in general the bill itſelf muſt be ſhewn, as well as the proteſt, becauſe the whole declaration muſt be proved, which cannot be without giving the bill in evidence. 12 Mod. 345. Gilb. L. E. 118. G. L. E. 119.

But in an action againſt the drawer of a bill which was loſt, it was held by Holt, C. J. that proof of the defendant's having owned that he had made the bill was ſufficient. Hart v. King. 12 Mod. 309.

With reſpect to a Promiſſory Note, the ſame rules, of what is neceſſary to be proved, apply, as in a Bill of Exchange; the maker being in the place of the acceptor; the payee, after indorſement, in that of the drawer; and the indorſors and indorſees the ſame in each.

In general direct proof is required of the ſignature of thoſe parties whoſe indorſement muſt be proved: But with reſpect to the party himſelf againſt whom the action is brought, proof by other circumſtances may be ſufficient to ſupply the place of actual proof of his ſignature; particularly, confeſſion. Thus where the defendant was ſued as indorſor of a note, and it was proved, that a perſon to whom application had been made to diſcount it, ſent it to the defendant, who looked at it, and ſaid it was his hand, and that the note, which had ſome months to run, would be paid when due; the Chief Juſtice would not permit the defendant to ſhew forgery, Ld. Hardwicke.

Cooper v. La Blanc. 2 Str. 1051.

gery, by ſimilitude of hands, becauſe that would tend to de ſtroy all negociation of Bills and Notes. But he ſeemed in clined to have admitted actual proof of forgery, if the defen ant could have given it, but this he was unable to do, and t plaintiff had a verdict.

Dale v. Lubbock, 1 Barnard. B. R. 198.

So, where a letter was produced under the defendant hand, in which he wrote to a friend that he had received Bill of Exchange from the drawer on the acceptor, bearin date ſuch a day, and payable to him or order ſix months aft date, and in all theſe circumſtances the bill agreed with t letter, though no ſum was mentioned in the letter; this w thought ſufficient evidence that the defendant had had t bill in queſtion in his poſſeſſion; and to ſhew that he had i dorſed it over, it was proved that he had ſaid he had come town to haſten the trial of a cauſe brought againſt him on indorſement he had made on a Bill of Exchange, and that fact he had brought down this very cauſe by proviſo.

Barnes, 3d ed. oct. 436. Hemmings v. Robinſon.

BUT where in an action againſt any one party, proof the ſignature of another is neceſſary to ſupport the actio againſt the defendant, that proof muſt be direct, confeſſio of the party whoſe ſignature it purports to be, will not b ſufficient evidence. Thus in an action againſt the drawer acceptor of a bill, or maker of a note, a confeſſion of an in dorſor that he indorſed the bill or note, will not be prop proof of the indorſement.

Whitcomb v. Whiting. Doug. 652.

BUT where an action was brought againſt one, on a join and ſeveral Promiſſory Note, ſigned by him and other proof of payment by one of the others, of intereſt and pa of the principal within ſix years before the action brough will be ſufficient to bind the defendant, and take the caſe ou of the ſtatute as to him.

Plinkney v. Hall. 1 Salk. 126. 1 Ld. Raym. 175. vid. Carvick v. Vickery. Doug. 653. Gil. L. E. 117.

WHERE a bill is accepted, or a bill or note is drawn o indorſed by one of two or more partners, on the partnerſhi account, proof of the ſignature of the partner acceptin drawing or indorſing is ſufficient to bind all the reſt.

WHERE a ſervant has a general authority, to draw, accep or indorſe bills or notes, proof of his ſignature is ſufficien againſt the maſter; but his authority muſt be proved.

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SUBSEQUENT aſſent, it would ſeem, is evidence of authority. Comb. 450.

A GENERAL cuſtom of the ſervant's ſignature, and payment by the maſter, is ſufficient proof of a general authority; and a general authority will continue to bind the maſter till its determination be generally known. Therefore if a ſervant, having authority, draw a Bill of Exchange in ſo ſhort a time after he is diſmiſſed, that the world cannot take notice of his being out of ſervice; or if he were a long time out of ſervice, but that kept ſo ſecret, that the world could not take notice of it, the bill in thoſe caſes will bind the maſter. 12 Mod. 346.

WHERE notice is to be given by the poſt, it would ſeem that proof of putting the letter into the poſt is ſufficient, that being in general all that is in the plaintiff's power to prove, though this in one place is denied. 1 Barnard. B. R. 198.

WHERE the defendant ſuffers judgment by default, and the plaintiff executes a writ of enquiry; it is ſufficient for the latter to *produce* the note or bill without any proof of the defendant's hand: This was determined ſo long ago as the 14th Geo. II. in a caſe in the King's Bench, where the plaintiff having offered *collateral* evidence to prove the defendant's hand, the court not only held that this was ſufficient, but ſaid, that the note being ſet out in the declaration, was admitted by the default, and that the only uſe of producing it was, to ſee whether any money was indorſed on it as paid. Bevis v. Lindſell. B. R. 2 Str. 1149.

NOTWITHSTANDING this, about four years afterwards the court of Common Pleas gave a different deciſion, holding not only that the note ought to have been produced, but both the note and indorſement proved. Billers v. Bowles. 18 G. 2. Barnes 233.

AND they gave the ſame deciſion in a caſe which occurred ſoon after. Ellis v. Wall. Id. 234.

LONG ſubſequent to this, the ſame court is, in one book, reported to have given a ſimilar opinion on the authority of the two laſt caſes. 2 Bl. Rep. 748. Snowden v. Thomas. 11 G. 3.

IT appeared that the declaration contained two counts, one on a note of hand, and another for money expended; the defendant pleaded a ſet-off; the plaintiff replied, and denied the ſet-off, and for want of a rejoinder, ſigned judgment: The

note

note was produced on the execution of the writ of inquiry, but not proved; and the defendant offered to confeſs damages on being allowed a month's time to pay the debt and coſts; this was not granted, but the jury found the value of the note.

THIS caſe coming before the court, Lord Chief Juſtice De Grey is reported to have expreſſed himſelf thus. Damages muſt either be proved or admitted. The preſent caſe does neither; for the ſet-off confeſſes only general damages on both counts. The note therefore ought to have been proved. But the confeſſion of the defendant's attorney makes this caſe particular in its circumſtances, and on that ground only I am for diſcharging the rule for ſetting aſide the inquiry. The reſt of the court agreed.

3 Wilſ. 155. BUT in another report of the ſame caſe, the opinion of the court is repreſented in very different terms; it is ſaid they were of opinion the jury had done right; the plea of ſet-off amounted to an acknowledgment of a debt, and the clerk to the defendant's attorney had offered, in the hearing of the jury, to confeſs damages. And *Gould* added, on a judgment by default in an action on a Promiſſory Note, or a Bill of Exchange, the ſum due on it is admitted, and needs not to be proved on the execution of a writ of inquiry.

3 Term. Rep. P. 29. G. 3. Green v. Hearne. BUT this point is clearly decided by a late caſe in the King's Bench. It was an action againſt the acceptor; he ſuffered judgment by default, the plaintiff *produced* a bill in the ſame terms as that ſtated in the declaration, but it did not appear to have been accepted; and no other evidence was produced. It having been objected that the bill produced did not correſpond with that mentioned in the declaration, the court obſerved that it might have been accepted, though not in writing; and that, by ſuffering judgment to go by default, the defendant had admitted the cauſe of action to the amount of the bill, becauſe that was ſet out on the record, and the only reaſon for producing it to the jury on executing the writ of inquiry, was to ſee whether or not any part of it had been paid.

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AND in a caſe before this, it had been held that it was not en neceſſary to *produce* the note or bill; for that if the defend- had paid part of it, he might have pleaded that, but he had judgment go for the whole.

Morris v. Lyne. B. R. H. 26 G. 3. Bayley's App. No. 7.

AND now, on ſuch judgment, a writ of inquiry is not ne- ſary, for the court on application by the plaintiff will, if good reaſon ſhewn to the contrary, refer it to the proper cer to aſcertain the damages and coſts, and calculate the tereſt.

Ruled. anon. B. R. H. 26 G. 3. Bailey 67.

BESIDE the different ſubjects of defence which may be col- ted from the general principles laid down in the preceding apters, the moſt uſual are thoſe which ariſe either from the al want of conſideration, or from the illegality of the con- eration for which the bill or note was given.

Raſhleigh v. Salmon. C. B. T. 29 G. 3. Bl. Term. Rep. 252.

THE want of conſideration, it is evident, will be a ſuffici- defence to an action by one party againſt another, from om he has immediately received the inſtrument; for ac- ding to the general principles of law, no contract can be ported without a conſideration, and accordingly it fre- ently occurs, that the defendant reſts his caſe on the cir- mſtance of the bill or note having been given merely for commodation.

BUT where the plaintiff has in fact given a conſideration he perſon from whom he immediately received the inſtru- nt, any preceding party being ſued on it, cannot protect ſelf, by ſaying that he himſelf had no value of the party whom he gave it; for by making himſelf a party to the rument, he contributed to its currency, and that circum- ce was, perhaps, one reaſon that prevailed on the plain- to part with his money: And that in this reſpect there is ifference, whether the perſon who actually gave a good ideration, knew that the inſtrument was actually given out one or not, appears evident from the caſes which been cited on a former occaſion.

Vid. Pillans v. Van Mierop. 3 Bur. 1663. Ruſſell v. Langſtaffe. Doug. 514.

WHERE a conſideration is illegal, that as between the par- to the tranſaction, is a ſufficient reaſon to preclude the ntiff from recovering, and it is immaterial, whether the al conſideration be, by the plaintiff himſelf, made the founda-

Gulchard v. Roberts. 1 Bl. Rep. 445. Vid. Biggs v. Lawrence. 3 Term. Rep. 454.

foundation of his ſuit, or ſet up by way of anſwer by the de
fendant; and therefore the defendant may ſhew that the no
or bill on which he is ſued, was given by him to the plaint
for an illegal conſideration.

WHERE the original tranſaction however is not moral
bad, its illegality ariſing only from its being prohibited by
poſitive ſtatute, every thing done in conſequence of the pr
hibited act, will not, of *courſe*, be conſidered as void: Th
where two partners enter into illegal contracts with thi
perſons, and on a loſs falling on the partnerſhip, one of t
partners takes upon himſelf to pay the whole loſs, he cann
recover againſt the other, his proportion of it. But if t
other give him an expreſs authority, or do any act whi
amounts to an expreſs authority, or even to a ſubſequent a
ſent to pay his proportion of the loſs; this will be bindi
on him.

Vid. St. 7. G. 2. c. 8.

THUS, where one of two partners, concerned in a ſtoc
jobbing tranſaction, paid the ſum of 3000l. the amount
the loſs they had ſuſtained, and the other gave him a bo
conditioned for the payment of half that ſum, it was held t
the obligee ſhould recover on this bond, becauſe it was a d
of honour which the obligor was in conſcience bound to p
and this bond was not within the ſtatute, though one fr
the loſers to the winners would have been ſo.

Falkney v. Reynous. 4 Bur. 2069. 1 Bl. Rep. 638.

THE ſame principle prevailed, and the authority of t
caſe was recognized in another which occurred very late
Keeble and *Hannay*, with two other perſons, had enga
together, in illegal ſpeculations in the ſtocks, and having
curred conſiderable loſſes, on the 8th of January, 1774, ca
to a ſettlement with *Portis* their broker, who had paid all
differences. On that occaſion Keeble repaid to *Portis*
whole ſum advanced by him except 811l. which was par
Hannay's ſhare of the loſs, and for which Keeble dre
bill on Hannay in favour of Portis, which Hannay accep
This bill not being paid by Hannay when due, Portis brou
an action on it againſt the executors of Keeble, and recov
the amount, no defence being ſet up on account of the illega
of the tranſaction. Keeble's executors afterwards brou

Petrie v. Hannay. 3 Term. Rep. 418.

action against Hannay, to reimburse themselves the sum recovered against them by Portis, the declaration being for money paid by the plaintiffs to the defendant's use, on which they obtained a verdict, and the matter being agitated in court on a rule to set aside the verdict, that rule was discharged. *Kenyon C. J. dubitante.*

WHEN the legality of a transaction is impeached, on account of its being in contravention of a positive law of this country, there is a material distinction between the case, where both plaintiff and defendant reside in this country, and that where the plaintiff resides abroad. In the latter case, though the plaintiff know that the defendant intended to transgress the laws of this country, yet if the contract be complete, before these laws can attach, he shall recover on that contract. Thus, where the plaintiff who resided in Dunkirk, together with his partner, who was a native of that place, sold and delivered a quantity of tea, for the price of which the action was brought, to the order of the defendant, knowing it was intended to be smuggled by him into England; but had no concern in the smuggling scheme itself, having sold the tea to the defendant in the common and ordinary course of trade, with an intention of being paid in ready money, or in bills drawn personally on him in this country: here it was held that the interest of the vendor being totally at an end, and his contract complete by the delivery of the goods at Dunkirk, the plaintiff had been guilty of no violation of the laws of this country, of which he was not bound to take notice, and therefore he had a right to recover. If indeed the plaintiff had engaged in the risk of smuggling the goods into England, he would then have been privy to the guilt of the defendant, and would not have been assisted by the laws of that country, whose laws he had contributed to elude.

Holman v. Johnson. Cowp. 341.

BUT where the plaintiffs or some of them reside in a place subject to the crown of Great Britain, and those of them so residing assist in the execution of the smuggling scheme, the others, though in fact unacquainted with the transaction, shall be considered

Biggs v. Lawrence. 3 Term. Rep. 454.

sidered as affected by the knowledge of their partners, shall not be assisted by the courts in this country.

Vid. Powell on Contracts. Vol. 1. 152 to 234.

WHAT is or is not a good consideration it is not intended here to inquire, any farther than, as it is necessary to point out a material distinction which the legislature has thought proper to establish, with respect to the effect which the illegality shall have, in general, and in some particular cases.

Vid. Doug. 636. (614)

IN general no advantage can be taken of the illegality of a consideration, but as between the persons immediately concerned in the transaction; any subsequent holder of the bill or note, by a fair consideration, cannot be affected by it.

BUT there are cases, in which it has been determined, that by the construction of certain statutes, the innocent indorsee shall not recover against the acceptor of the bill, or drawer of the note.

BY st. 9 Ann. c. 14. s. 1. "All notes, bills, &c. where "the whole or any part of the consideration, shall be for "money or other valuable thing whatsoever, won by gaming "or playing at cards, dice, tables, tennis, bowls, or other "game or games whatsoever, or by betting on the sides or "hands of such as do game at any of the games aforesaid, "for re-imbursing or re-paying any money knowingly lent "or advanced for such gaming or betting, or lent and ad-"vanced at the time or place of such play, to any person or "persons so gaming or betting as aforesaid, or that shall, dur-"ing such play, so play or bet, shall be utterly *void, frus-*"*trate, and of no effect, to all intents and purposes what-*"*ever.*"

Bowyer v. Bampton. Str. 1155.

AFTER this statute, there occurred a case in which it ap-peared, that the defendant had given to one Church, certain Promissory Notes for money knowingly advanced by him to game with at dice; that Church indorsed them to the plain-tiff for a valuable consideration, who had no notice that any part of the money for which the notes were given had been lent for the purpose of gaming. After two arguments, the court were of opinion, that the true construction of the words "shall be utterly void, &c." was, that no recovery could

ad againſt the defendant on the note, even in the hands of n innocent indorſee.

By ſt. 12 Ann. ſt. 2. c. 16. ſ. 1. "All bonds, contracts, and *aſſurances* whatſoever, made for payment of any principal, or money to be lent, or covenanted to be performed upon or for any uſury, whereupon or whereby there ſhall be reſerved or taken above the rate of five pounds in the hundred, ſhall be utterly *void*."

On this ſtatute, and on the authority of the caſe on the ſtate of gaming, it has been determined that no action can be aintained by an innocent indorſee, againſt the acceptor of a ill given on an uſurious conſideration: The court were of pinion that the words of the ſtatute were too ſtrong not to tend to this caſe, the word *aſſurances* being a general term, omprehending all kinds of *ſecurities*, notes and bills as well bonds, and that the former caſe ſtood directly in the way. Lowe v. Waller. Doug. 736.

By ſt. 5 Geo. 2. c. 30. ſ. 11. "Every bond, bill, note, contract or agreement, or other ſecurity whatſoever, made or given by any bankrupt, or by any other perſon, unto or to the uſe of or in truſt for any creditor or creditors, or for the ſecurity of the payment of any debt or ſum of money due from ſuch bankrupt at the time of his becoming bankrupt, or any part thereof, between the time of his becoming bankrupt, and ſuch bankrupt's diſcharge, as *a conſideration*, or to the intent to perſuade him, her, or them, to conſent to or ſign any ſuch allowance or certificate, ſhall be wholly *void*, and of no effect; and the monies thereby ſecured or agreed to be paid, ſhall not be recovered or recoverable; and the party ſued on ſuch bond, bill, note, contract, or agreement, ſhall and may plead the general iſſue, and give this act and the ſpecial matter in evidence."

There can be no doubt, from a compariſon of the words f this ſtatute with thoſe of the two preceding ones, that the me determination would be given againſt an innocent inſee in this caſe as in the two former: But in none of the ſes is he altogether without remedy, for he may ſue the inſor on his indorſement, becauſe as between them it is a new Str. 1155. Doug. 744.

new bill, and no inquiry can be made into the original c
ſideration.

It has been obſerved, that except in the particular ca
above-mentioned, the defence ariſing from the illegality
the conſideration, cannot be ſet up againſt any other plain
than the perſon who was privy to the original tranſaction: I
this rule muſt be confined to the ordinary caſe of a bill or n
indorſed before it was due; for it has been repeatedly rule
Guildhall, that wherever it appears that a bill or note h
been indorſed over, ſome time after it is due, which is ou
the uſual courſe of trade, that circumſtance alone thro
ſuch a ſuſpicion on it, that the indorſee muſt take it on t
credit of the indorſor, and muſt ſtand in the ſituation of t
perſon to whom it was payable.

D. per Buller J. at Launceſton Spring Aſſizes, 1788.

Therefore in an action by the indorſee of a Promiſſ
Note payable on demand, againſt the maker; the defend
was admitted to give evidence that the note had been i
dorſed to the plaintiff a year and a half afterwards; and
impeach the conſideration by ſhewing that it had origina
been given for ſmuggled goods, and that payments had be
made upon it at ſeveral times. And though no privity w
brought home to the plaintiff, Mr. Juſtice Buller nonſui
the plaintiff.

Banks v. Colwell, at Launceſton Spring Aſſizes, 1788, before Buller J. cited 3 Term. Rep. 81.

But the generality of this rule was doubted by L
Kenyon, though the other three Judges adopted it in its e
tent. It is however generally agreed that it ſhall prev
wherever it appears on the face of the note or bill, tha
has been diſhonoured, or if knowledge can be brought ho
to the indorſee that it had been ſo.

Therefore in an action by the indorſee of a Promiſſ
Note againſt the maker, where the note appeared to h
been noted for non-payment, and indorſed after it beca
due, the defendant ſhall be admitted to ſhew that the n
was paid as between him and the original payee, from wh
the plaintiff received it.

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